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No. 2641.

IN THE

# United States

# Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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**Wilson & Willard Manufacturing Company, et al.,**

*Appellants,*

*vs.*

**Robert E. Bole, et al.,**

*Appellees.*

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## BRIEF FOR APPELLANTS.

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Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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### STATEMENT OF THE CASE.

This cause comes before this court on an appeal from an interlocutory decree entered against the appellants, defendants Wilson & Willard Manufacturing Company and Elihu C. Wilson, which interlocutory decree held that the Bole *et al.* patent No. 1,080,135 sued on was valid and infringed by the defendants by manufacture and sale to others to be used as under-reamers embodying, containing and embracing the invention de-

scribed, set forth and claimed in and by said letters patent No. 1,080,135. The defendants interposed the following principal defenses: first, that Bole, the patentee of said letters patent, was not the original, true and first or prior inventor of the subject of said letters patent, but that the defendant Wilson was the original, sole and first or prior inventor of the subject of said letters patent; second, that said Bole obtained said letters patent surreptitiously and unjustly for what was in fact the invention of said Wilson, who was using due diligence in adapting, perfecting and utilizing the same, and who, in fact, applied for letters patent for said subject of said letters patent sued under within one month after the time said Bole applied for said letters patent sued under, and that, upon an interference proceeding declared in the Patent Office pursuant to Sec. 4904 U. S. Revised Statutes, said Wilson had been found the first, original, true and sole inventor of the subject of said letters patent sued under; third, that the said Bole patent is void for anticipation, or want of novelty, in Bole, the under-reamers containing and embodying the invention therein described and claimed having been manufactured and sold by the defendants with the knowledge of the complainant Bole and without protest from him and with his tacit consent for a period of approximately twenty-two months before said Bole applied for said letters patent in suit; and, fourth, that said Bole is estopped from asserting any claim against these defendants in and about the subject of said letters patent, or from making any claim of right to said invention, by his own disavowal, dis-

claimer or covenant made or entered into within a month prior to the time when said Bole applied for said letters patent in suit.

The interlocutory decree made the usual further findings as prayed for in the bill, and the decree provided for the usual accounting and injunction, the latter directed against each of the said defendants, and ordered the usual taxation of costs against the defendants. The defendants assigned the following errors upon taking their appeal [pp. . . of the transcript]:

I. That the District Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, erred in entering any decree in favor of complainants;

II. That said court erred in finding and decreeing that the letters patent sued on are good and valid in law;

III. That said court erred in finding and decreeing that the letters patent sued on, because good and valid in law, are infringed;

IV. That the court erred in finding and decreeing that Robert E. Bole was the original, first, true and sole inventor of the invention disclosed and claimed in and by the letters patent sued on;

V. That said court erred in not finding and decreeing that Elihu C. Wilson of the defendants was the original, first, true and sole inventor of the invention of the letters patent sued on;

VI. That said court erred in finding and decreeing that the letters patent sued on are not anticipated by the manufacture, sale and use of under-reamers manu-

factured and sold to others to be used by the defendants prior to the date of application of the letters patent sued on;

VII. That said court erred in finding and decreeing that the complainant, Robert E. Bole, did not surreptitiously or unjustly obtain the letters patent sued on for that which was in fact invented by another, viz.: Elihu C. Wilson of the defendants, who was using reasonable diligence in adapting and perfecting the same;

VIII. That said court erred in not holding and finding that the complainant, Robert E. Bole, was estopped from asserting any right in and about the invention of the patent sued on and from prosecuting any claim of infringement of said letters patent as against the defendants.

IX. That said court erred in finding that the defendant, Elihu C. Wilson, obtained the invention of the patent sued on from the complainant, Robert E. Bole.

X. That said court erred in receiving in evidence the deposition of Roy L. Heber as a witness on behalf of complainants;

XI. That said court erred in not following and adopting the decision of the United States Patent Office that the defendant, Elihu C. Wilson, and not the complainant, Robert E. Bole, is the original, true, first and sole inventor of the invention of the letters patent sued on;

XII. That said court erred in not admitting certain testimony offered or attempted to be taken on

behalf of defendants tending to further establish the defendant, Elihu C. Wilson, and not the complainant, Robert E. Bole, as the original, true, first and sole inventor of the invention of the letters patent sued on;

XIII. That said court erred in refusing to admit certain evidence offered by defendants to further prove that the defendant, Elihu C. Wilson, and not the complainant, Robert E. Bole, was the original, true, first and sole inventor of the invention of the patent sued on;

XIV. That said court erred in holding that the complainant, Robert E. Bole, was in any manner diligent in and about the invention of said letters patent sued on, if in fact in any manner possessed of the same prior to disclosure of the same to him by the defendant, Elihu C. Wilson;

XV. That said court erred in holding that the defendant, Elihu C. Wilson, was lacking in diligence or negligent as to reducing the invention to practice or applying for patent for same.

XVI. That said court erred in not holding and finding that the complainant, Robert E. Bole, obtained the invention of the patent sued on from the defendant, Elihu C. Wilson.

The opinion of the lower court was orally rendered, and was reported by one of the reporters who took the record of the proceedings in the case as follows:

The Court: In this case on trial I do not care to hear any further argument on the subject. I have carefully considered and am thoroughly convinced and do not need any further argument or evidence to con-

vince me that Bole invented this key and is justly entitled to a patent. If there had not been any patent issued in the case, or if the patent had been issued to the defendant, I should have decided this case in favor of Bole. There has been a good deal of criticism indulged in concerning some of these witnesses who have testified in favor of Bole, particularly Adams and Heber. I do not see any necessity for their being criticised. If a man wants to fix up evidence, it seems to me that he could fix up evidence more material than those witnesses were able to testify to. And in the same way in regard to this exhibit that has been introduced. If Mr. Bole was wanting to fix up evidence for the purpose of perjuring himself and to have other people perjure themselves, he would have gotten evidence that was more material. Of course, these are material in a way, but they are not in any sense controlling. Now, Mr. Bole has been criticised for not being industrious and active in his application for a patent. Nothing was done with this thing from the time he conceived it in his mind and suggested it to these witnesses till he apparently wrote a letter to Mr. Willard about it in 1911. He was not in the business of manufacturing reamers. He was not in a situation to put it into execution. According to the evidence, as I view it, he applied to his associates to put this key into use. Of course, until it was tried out, it would be nonsensical to apply for a patent. He had no opportunity to apply for a patent, associated as he was with Wilson and Willard, unless they would try it out. I think that entirely excuses his delay down to

1911, from the time this key was invented or put into practical use, until the patent was applied for. I think Wilson was as negligent as Bole in that regard. He was more interested in it, probably, if he were the inventor, than Bole was. He does not make any explanation why he waited nearly two years to apply for a patent. That letter that Bole wrote to Wilson when he got into the difficulty, it seems to me, is the most natural thing in the world for him to do. What it says we can all accept as absolute truth. That is to say, that he wrote the letter and made these claims. And what he claimed in the letter was the most natural thing for him to do if he was the inventor of this key. I think it was a very unnatural and unusual thing for Mr. Wilson to do, if he claimed to be the inventor of that thing, to make a settlement with Bole without including in that settlement the controversy concerning the key. It was very unbusinesslike and very unnatural. I have not the slightest doubt about how to decide this case and I will decide it in favor of complainants.

I.

**Circumstances Surrounding the Trial of this Case.**

This case was tried before the Honorable Oscar A. Trippet in March and April of this present year, but a very few days after his ascending the bench upon appointment to fill the vacancy caused by the resignation of former Judge Wellborn. It may, appellants contend, be affirmed, with all due propriety and respect,

that the court was almost entirely unfamiliar with the principles, doctrines and authorities pertinent to the determination of questions of patent law, having been previously engaged in the general practice of the law, and it is our recollection that the trial judge has admitted from the bench his practically entire unfamiliarity with the subject of patent law prior to his incumbency. This present case involved principles of patent law which, while possibly not particularly abstruse or obscure, nevertheless required the nice weighing of evidence which must have been attended with difficulty to a jurist in whose mind the principles involved in such determination were newly implanted. The very opinion of the court itself displays a misconception of the bearings of the case and of the principles to be applied in considering the evidence as it apparently settled or was accepted in the mind of the court. The court, for instance, implies, as to the patentee complainant Bole, that if he "was wanting to fix up evidence for the purpose of perjuring himself and to have other people perjure themselves, he would have gotten up evidence that was more material. Of course, these are material in a way, but they are not in any sense controlling." This leaves us at a loss to figure out what the trial judge considered controlling in the case, as complainant only produced two material witnesses in an attempt to bolster up his story (and we may say that the whole case of the complainants is the story of the one witness, complainant Bole, and that unless it can be found the complainant, Bole, first having the inven-

tion of the patent in suit, disclosed it to Wilson before Wilson, as proven, disclosed it to him, the entire case of the appellees must fall), in addition to a so-called deposition contended to have been taken under the rules and admitted by the trial judge over objection by appellants *particularly because the same was not taken duly and regularly within the strict provisions of the new rules.* If, then, the testimony of these two witnesses and one deponent, backed up by a postal card and an amazing sketch or tracing in evidence as Complainants' Exhibit E, are not "in any sense controlling," it is hard to be seen upon what grounds this case was decided by the lower court. For let it be understood Complainants' Exhibit E and said postal card are the only pieces of original evidence offered by the complainants in this case to substantiate the story of Bole backed up by the testimony of his chum and friend Adams, his former employee Naphas, and the alleged deposition story of Bole's former friend Heber.

The paucity of this showing, compared with the full showing made by defendants and the large number of original exhibits introduced by them, established as genuine and dating back to the beginnings of things in the exploitation of the invention of the patent in suit, establishes the wonder in appellants' mind as to what the trial court found to be in any sense controlling in this case as decided. Again, the trial court defends Bole from our attack of want of diligence in and about the invention of the patent in suit assuming that Bole originated such invention. The court in its opinion says:

"Of course, until it was tried out, it would be nonsensical to apply for a patent. He had no opportunity to apply for a patent, associated as he was, with Wilson and Willard, unless they would try it out. * * * I think Wilson was as negligent as Bole in that regard. He was more interested in it, probably, if he were the inventor, than Bole was. He does not make any explanation of why he waited nearly two years to apply for a patent."

This entire misconception of the doctrine of diligence as applying to the activities of rival claimants of invention qualifies the whole decision of the trial court as a basically wrong interpretation of the law applicable to the facts present. The court excuses Bole for waiting over four years after the time when he contends he conceived of the invention, during nearly two years of which time he was in the employ of or associated with the interests of Wilson, while Wilson was vigorously asserting his right to the invention and manufacturing and selling under-reamers in large quantities containing the same; and furthermore, the court criticises Wilson for negligence when Wilson was thus vigorously asserting his right to the invention and was extensively introducing and exploiting the same. It was not incumbent upon Wilson to apply for patent until the expiration of the two-year period permitted by Sec. 4886 U. S. Revised Statutes. Bole, on the other hand, who does not contend that he ever reduced the invention to practice, is excused in his delay in filing during all of the period of time when Wilson was in his presence asserting his right to the inven-

tion. It was the duty of Bole to speak out during this latter period of time if he contended any rights he had or might have were being invaded, and we contend that he was estopped from asserting against Wilson any rights in and about the invention. It is absurd to expect an explanation from Wilson of why he waited nearly two years to apply for a patent, because the statutes make an explanation for him.

Further, the court seems to consider the unusual, insulting and animus-tinctured letter in evidence as "Bole letter of January 17, 1911," as a natural explosion on the part of Bole, and the court criticises Wilson for making a settlement with Bole and taking Bole's word that he would do nothing more about the invention of the key the inventorship of which he puts forth a claim to in said letter.

Had Wilson acknowledged Bole's inventorship he, Wilson, could not thereafter have applied for patent. He believed that Bole had only been putting up an eleventh-hour claim of inventorship of the key, which is the one novel feature of the combination constituting the invention, in order to get a better settlement, as a debtor, from Wilson, and when Bole agreed forever to put any such claim aside, Wilson doubtless believed he meant it, inasmuch as Wilson must have realized the futility of Bole's asserting any such claim after he, Wilson, had made and sold under-reamers containing the invention some twenty-two months previously without protest from Bole. It would seem as if the factor of human nature escaped the discernment of the court in this phase of the case, as reflected by the court's

findings. The court in its opinion seems to think that it was an unnatural and unusual thing for Wilson to do, namely, to make a settlement with Bole without including in that settlement the controversy concerning the key; and yet, as hereinafter pointed out in detail, the court ruled [line 4, p. 145, transcript] that it was immaterial for Wilson to endeavor to explain why he did not put the key matter into that agreement of settlement. This would look, on the face of the opinion, like reversible error, as would other rulings of the court on the admissibility of evidence, and particularly on the admissibility of the Heber deposition. We do not find in the whole opinion of the court any assertion that Bole invented the key, the gist of the subject of the patent, and disclosed it to Wilson. If this cannot be found, under all of the decisions and doctrines the findings of the lower court must be reversed and Wilson found to be the original inventor of the subject of the patent in suit. We fail to find in the entire opinion of the court anything to support the conclusion reached; and, on the contrary, we believe the most logical tieing together of the detailed findings or observation of the court set forth in such opinion would be to produce a finding the direct antithesis of the ultimate finding and conclusion reached by the trial judge.

The court in its opinion makes no reference to that important phase of the case as to which the law, in great amplitude, was presented to the court, namely, the effect upon a federal court of a finding by that special tribunal, the Patent Office, upon the same fact or set of facts, pertaining to questions of originality

and priority of invention. This doctrine will be extensively treated of further on in this presentation, and it is the doctrine strongly announced by the Supreme Court of the United States in Morgan v. Daniels in 153 U. S. 120, which goes so far as to say that unless strong and convincing proof is found to the contrary the courts must adopt the findings and conclusions of the Patent Office with respect to the originality and priority of invention contested as between two or more claimants for letters patent (giving the opinion the more limited scope applicable in this case). How the trial judge, after the Patent Office had, as proven at the trial, found Wilson to be the sole, original, true and first inventor of the subject of the patent in suit, instead of Bole, could reverse that finding in effect, and could do so upon a more meager record, particularly in view of the fact that the trial judge was exploring new legal territory, is difficult for appellants to understand. Without in any respect implying that the independent investigation by the trial judge of the evidence was proper and to be expected, it would nevertheless seem that the advice and assistance, as it were, of the Patent Office, rendering services as to the determination of questions of fact, somewhat as a jury assists the court, would have been welcomed by the trial judge, particularly within the sanctioning doctrine of Morgan v. Daniels, *supra*. As we shall show this Honorable Court at argument, the patentee Bole took an appeal from the decision initially rendered in the Patent Office awarding priority and originality of invention of the patent in suit to the de-

fendant Wilson, and such appeal eventuated in an affirmance of the decision of the initial tribunal, the board of examiners in chief who heard and determined such appeal strongly endorsing and reiterating the findings of the examiner of interferences. There will be produced at argument a certified copy of the opinion so rendered by the board in the Patent Office, and of which this Honorable Court will be asked to take judicial notice, the same being the certified record of a federal tribunal.

The opinion of the trial judge is also silent with respect to the question of anticipation. There is no traversing by complainants of the proof of defendants that under-reamers containing and embodying the invention of the patent in suit were manufactured and sold in large numbers by the defendants continuously during a period of time extending approximately twenty-two months prior to the date upon which the patentee complainant Bole applied for the letters patent sued under. Alternatively, that is, without consideration of any of the other defenses urged, this defense, under Sec. 4886 of the Revised Statutes, is sufficient to reach a finding for the appellants. The date of the invention by Bole is the date of application, unless he shall have proven an earlier date, which we contend he has not, and we contend that all the circumstances tend to establish this contention, for, had Bole invented and disclosed the subject of the patent in suit at a time earlier than the initiation of Wilson's vigorous assertion of his claim to the invention and his vigorous exploitation of the same, any

human conduct on his part of a kind to be considered by this court in weighing the issues of this case would have led him to apply for a patent at least as soon as Wilson commenced the assertion of such rights, or at least would have led him to protest such assertion and to speak out and make claim of inventorship in himself. So on these phases of the case, which, to appellant, seem controlling, we find the opinion of the court silent. It is true that the trial court saw and heard the witnesses, with the exception of the witness Heber for complainants, whereas the Patent Office considered their evidence and presentation in deposition form. But even at that the evidence must be considered *per se,* and the preponderance of evidence must be determined, and it is appellant's contention that unless each and every one of appellee's witnesses is to be believed in each and every particular, and unless the appellee Bole is to be believed in each and every particular, and further, unless approximately all of the many witnesses for the appellants are to be disbelieved and discredited in practically each and every particular, the decision of the lower court must be reversed. It is not conceivable that a witness litigant like Bole, whose story, in the main, is uncorroborated by word of mouth or genuine evidence, and whose story in fact is twisted out of any presentable shape by his own confusion and admissions on cross-examination, and whose story must alone, and uncorroborated, be believed as against the denials and assertions of numerous witnesses, and the corroboration of whose story is as scant and meager and dubious as the record in this case shows, can pre-

vail, even if the trial court sees him and hears him. It must be, from the above and other considerations, that the trial judge, delving for the first time into the principles of the patent law from a judicial standpoint, if from none other, reached out in what is, from his opinion, an apparent misconception and confusion of principles of patent law and misapplication of the same to the facts, and picked out of the patchwork of the case some single thread the color of which caught his eye for the moment, and by that thread suspended his findings, the security of which suspension we respectfully challenge.

II.

**The Inadmissibility of the Heber Deposition.**

We have pointed out that the complainant Bole, who was the applicant for the patent sued under and assigned an interest therein to Edward Doble, the other complainant, is supported in his case by only two witnesses and the deponent Heber. One witness, Adams, testified as of an alleged disclosure to him of the invention, or the key portion thereof, by Bole, in September, 1908. The other witness, Naphas, testified as to the removal of a key by Bole from a Wilson reamer, *after the key had been manufactured and put in the reamer at the shop and in the business of the defendants, in 1911.* We shall show that his testimony is entirely discredited, inasmuch as he fixes the time by certain work in the shop which was not performed in that shop even during that entire year. There is not

a single thread of evidence to support the contention of Bole that he disclosed the invention to Wilson prior to Wilson's activity, even assuming Bole was in possession of the invention at that time. The deponent Heber also testifies to the alleged disclosure by Bole to him of the invention, or of the key portion thereof, in September, 1908. This, supplemented by the postal card in evidence as Complainants' Exhibit D, and which is introduced to show that Bole was in the vicinity of Heber in September, 1908, and Complainants' Exhibit E, tracing or sketch, completes the substance of the evidence and testimony on behalf of the complainants. And this sketch in itself and on its face is for a "key remover for new reamer if adopted." It is not for the key, the only new part of the new reamer, which was made by Wilson and never made by Bole, and shows an inoperative construction, inasmuch as the key and the lever shown therein and faithfully reproduced by defendants and put in the hands of the complainant Bole when on the stand, were with futility attempted to be operated by Bole, he being unable to remove the key from the reamer with the lever. It will be seen how vital it is to the making out of any case by the appellees that this deposition of Heber should be allowed to remain in the case. Without it, Bole has only the attempted corroboration of Adams as to the 1908 alleged disclosure of the key portion of the invention. Beyond that he has nothing but a postal card and, as we shall show, an exceedingly suspicious sketch or tracing and a contradicted and unavailing witness, Naphas. As to the postal card incident, we raise no

contention that Bole was not in Maricopa in September, 1898, but we do contend that Bole never had the invention at that time, and never disclosed it to Heber and Adams at that time.

The record in this case shows that the notice to take the deposition of Heber was given more than a hundred days after the case was at issue on the bill and answer under the equity rules [lines 16-25, p. . .]

Such a deposition could only be taken, not under rule 69, which provided for taking such a deposition out of court within certain times, but rather under new equity rule 47, which is as follows:

"Depositions—To Be Taken in Exceptional Instances. The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named official, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires."

There is no showing in this cause that any application was made to the court for permission to take this Heber deposition, and of course no affidavit showing any good and exceptional cause for departing from the general rule, and such alleged deposition was taken *more than a hundred days* after the time the case was at issue. Equity rule 31 specifies that the cause shall be deemed to be at issue upon the filing of the answer. In this case a counterclaim was interposed, but the order to strike that out was entered over one hundred days before notice of the alleged deposition was given. It is manifest, therefore, that under the new equity rules this alleged deposition was not noticed or taken in proper time, and that the procedure was not in accordance with the rule, even in the attempted taking of the same, no application being made to the court as required by rule 47, which provides such application is to be made even "when allowed by statute." It is only under the provisions of the *de bene esse* statutes, Secs. 862-3 *et seq.*, that such procedure could be taken, and such procedure cannot properly be taken under this rule without application to the court. We invite this Honorable Court's attention to matter included in line 3, p. 709, to line 32, p. 711, as showing the procedure before the trial judge with respect, finally, to the admission of this alleged deposition. Defendants pointed out, as therein shown, that defendants had not attended the taking of a deposition or acquiesced in or countenanced its taking, for, had we so done, we doubtless would have been in a singular position before the trial court. We remained away from the taking of

that deposition purposely, not wishing to countenance it in any respect and not wishing the argument to be made that we were there and ready and could have cross-examined. On the trial we pointed out, as the record shows, that the trial judge had stated that possibly defendants had been remiss within any considerations of equity in not moving earlier to suppress this deposition. It is defendants' contention that we moved at the proper time, namely, when it was offered, and it is our contention that it is not good equity for a man to depart from the plain spirit and import of the equity rules. The point remains that complainants did not produce the witness at the trial, although, as pointed out to the trial court at the time, the witness was in California not long before. We made to the trial court the suggestion that we be permitted to read the deposition of this same witness Heber taken in the interference proceeding between the party Wilson and the party Bole concerning this same key invention matter. It was not adopted. And we pointed out to the trial court that we remained away through caution and not through negligence, but, as the transcript shows, the court stated that it thought the proper practice was to make a motion to suppress the deposition. It is defendants' contention that this motion, in effect, was made in our objection to the consideration of the alleged Heber deposition. Apparently it was not the form of our motion but the time of our objecting that the court hinged its ruling upon, the objection to the deposition being overruled. We believe it was entirely within the proper discretion of the court

to admit the other Heber deposition and show the variance between the same and the alleged deposition offered, inasmuch as it is settled law that the records of the Patent Office may be considered in the courts pertinent to the determination of questions of fact, as within the doctrine of Morgan v. Daniels, *supra*.

Either rule 47 means that a deposition must be taken out of court in a certain manner and within a certain time and upon a certain preliminary procedure before the court, or else, appellants contend, its entire meaning and purpose is vitiated and destroyed. Appellants were entitled to cross-examine the witness Heber, and to do so in open court so that the court could see and hear such witness, of which we were particularly desirous in the case in question and concerning the witness in question. What appellees did was to informally take the recitation of a man, and without warrant by the rules, and what the trial judge did was to sanction such procedure and, in effect, deny us our right of cross-examination of the witness and our right to have him seen and heard by the court.

There is on this question a recent decision rendered in the Southern District of New York, by District Judge Mayer, on the 23rd of February, 1915, and not reported at the time of the trial of this case, namely, Victor Talking Machine Company v. Sonora Phonograph Corporation, 221 Fed. R. 676. In that decision it was held that under new equity rule 47, which prescribes the time after the case is at issue within which depositions shall be taken, unless otherwise designated by special order, it is the duty of the court, on motion

of the adverse party, to suppress the deposition taken after such time and without application for such an order. We call particular attention to the text of this decision, from which excerpts are here quoted (p. 677):

"These rules, with others, were designed to expedite the progress of suits in equity. After the lapse of time under the rules the cause is automatically placed on the calendar, and any departure from the automatic action of the rules in various respects may be had only when 'otherwise ordered by the court or judge for good cause shown.' If, therefore, after the time expiration, it becomes necessary to take depositions, there is no difficulty in making a proper presentation to the court or judge and obtaining an appropriate order."

Why did not the complainants in this case make application to the court for such order?

It will be urged by appellees that rule 47 cannot limit the time of taking depositions so as to abridge any rights inherent under the revised statutes of the United States, in view of Sec. 863. As to that, we contend that the new rules do not abridge any right, but simply point out, as in rule 47, how these rights are to be enjoyed and exercised. In the opinion under discussion the court says as to this (p. 678):

"It is urged, however, that rule 47 cannot limit the time of taking depositions, in view of Sec. 863 of the United States Revised Statutes, * * * and that, where the witness is one within the purview of that section, a deposition may be taken after the time prescribed in rule 47. But rule 47 refers, among other things, to *'all* depositions taken under a *statute,'* and,

as it must be assumed that the Supreme Court was construing (among others) Sec. 863, the validity of the rule is, of course, conclusive upon this court. * * * In the suits at bar plaintiff gave notice of the taking of depositions on December 20, 1913, some six months after issue was joined. Neither rule 47 nor rule 1 of this court was complied with. Defendant promptly and clearly notified plaintiff that it objected to this taking of testimony by deposition, that its counsel would not attend, and that it would move at the trial to strike out the testimony thus taken and for further germane relief. Nevertheless plaintiff proceeded, and, in doing so, it took its chances. There was nothing further which defendant was called upon to do. *It might have waited until the trial,* but, instead, has moved now, and, even if laches was an answer (which I doubt) there is none in this case."

It is pointed out that the court held that the defendant might have waited until the trial, and that even if laches was an answer ("which I doubt), there is none in this case." The court further points out that upon the observance of the rule defendant had the right to rely, and a motion to suppress the fact depositions was granted. It is evident that the court was of the opinion that laches would not be an answer, and that the defendant might have waited until the trial, which we did. The very fact that we remained away from the taking of such deposition was enough to put the complainants upon their guard and warning to produce the deponent Heber at the trial. It is our contention that, for the reasons

above set forth, and within the fair interpretation of the opinion just referred to, no deposition of Heber was taken, and that the trial court judge was in error in admitting such deposition. We respectfully and urgently solicit this Honorable Court that the deposition of Heber be not considered in its deliberations, and that the appellees' case on testimony be limited to the witnesses Bole, Adams and Naphas.

III.

**The Relations Between the Parties.**

The record in this case shows [line 1, p. 131, to line 3, p. 136, inclusive, of the transcript] that the defendant Wilson has been acquainted with the complainant Bole since the year 1904 or 1905; that Bole was an employee of the Bakersfield Iron Works at the time Wilson was manager of that institution, for possibly a year, as a helper or machinist, and that he became an employee at the Wilson & Willard Manufacturing Company's plant, that is, the defendant corporation's plant, at Los Angeles, California, in 1907; that he was there as a machinist and worked on a lathe and did shop work for a year or so; that afterwards Mr. Willard, Mr. Wilson's partner in the defendant corporation, joined with Bole in the pump business, the pump being made by the defendant corporation and Bole working in the shop part of the time and part of the time in the field soliciting business; that pumps were the only things the defendant corporation manufactured for Bole and Willard; and that the pump

department never made any reamers and were merely customers of the Wilson & Willard Manufacturing Company, with only one or two exceptions, owning only one or two machines, small lathes, which were used in the manufacture of pumps, the Bole Pump Company, as this pump business was called, being not in position to manufacture under-reamers or any other tools; that the relations became strained between the Bole Pump Company and the defendant corporation, and that finally a settlement was entered into between them about the first of February, 1913, *some twelve days before Bole filed his application for the patent in suit,* such settlement following the receipt by Wilson of the insulting and preposterous letter heretofore referred to, being Defendants' Exhibit Bole letter of January 17, 1911. The transcript further shows [line 19, p. 142, to line 11, p. 147] that this settlement was entered into after Wilson had attempted to point out to Bole that he was endeavoring to help him, as his interests had for a long time, and that Bole replied he was hasty in writing the letter of January 17, 1911; and that Wilson asked him, in regard to any claim to the invention of the reamer key Bole had in mind, why he had not told him before that he thought he, Bole, was the inventor of it; and that that was the first intimation he ever dreamed of that Bole claimed any part whatever in the invention of the key. Wilson testifies that Bole said, "Well, be that as it may, I will do nothing further with this anyway. If we can get our accounts here settled satisfactorily I will do nothing further with the key." Wilson further testi-

fies that after the preliminary terms of this agreement were discussed between Willard, Bole and W. W. Wilson, his brother, an agreement was dictated, which is in evidence. The witness Wilson then testifies as follows: "Mr. Bole said if he could get a satisfactory settlement of his account he would do nothing further with the key matter. I was endeavoring to explain why I did not wish to put it in that agreement." The record then shows that the court said: "That is not material."

We pause at this time to compare this testimony of the witness with that portion of the opinion of the trial judge which is as follows: "I think it was a very unnatural and unusual thing for Mr. Wilson to do, if he claimed to be the inventor of that thing, to make a settlement with Bole without including in that settlement the controversy concerning the key. It was very unbusinesslike and very unnatural."

If the court considered this act of Wilson's very unbusinesslike and very unnatural, why did the court hold that it was not material for the witness to explain why he did not wish to put the key matter in the agreement? In many places the court ruled similarly where an attempt was made to present evidence showing the relations between the parties, including the relations between the party Double, assignee of an interest in the Bole patent in suit and one of the complainants, and the president of the Union Tool Company, a concern in direct competition with the defendants in the manufacture of oil well tools, including underreamers, which would tend to show a motive for the

assertion of the claim of invention by Bole with respect to the subject of the letters patent sued on herein, namely, to persecute and harass the defendants, and further developing the animus shown by Bole in his letter of January 17, 1911.

Adverting again to the testimony last referred to, and now on p. 145 *et seq.* of the transcript, we find testimony of Wilson that Bole stated, "I see you have made no mention of the key matter in this agreement," and that Wilson replied, "Bob, I don't believe it has any place in this contract. This is a contract between the Bole Pump Company and the Wilson & Willard Manufacturing Company; and whatever agreement, if you think you have any rights at all to this key, that will be made between you and I, will be a personal matter. But, it may be a part of this contract, in consideration of the contract, as you suggested that if you can get a satisfactory settlement of this pump account you would agree to waive any claim that you may have to this key," and that Wilson further said, "It may to that extent belong in this contract; but I hardly think it does."

The witness admits he probably should have gone to a lawyer. But he states that Bole replied, "Well, I will do nothing further with the key matter. I will give you no further trouble with that." This was less than three weeks after Wilson had received his first knowledge of Bole's assertion of any right whatsoever with respect to the origination of the single-piece key under discussion, namely, by the letter of January 17, 1911.

We again insist that this promise of Bole's was a consideration for the settlement he got, and was a waiver of his right to make any claim with respect to the invention, particularly as against the defendants in this case. If reduced to formal agreement, the matter might have been serious for Wilson as being a recognition of some right to the invention or some claim of right to the invention in Bole. Thus we have in this complainant a disgruntled person who made a cheap settlement with the defendants, Willard of the defendant corporation having severed his interest with the Bole Pump Company [Qs 493-494, pp. 386-387, transcript, testimony of Willard given in interference Wilson v. Bole]. Bole was a mechanic under Wilson both at the Bakersfield shop and at the defendant corporation's shop, and when he, having gone into business independently and been backed up by Wilson's partner, was called to account, and having been let off with a cheap settlement, he flew at once to Wilson's chief competitor, Double, president of the Union Tool Company, and assigned forthwith and outright to him an interest in the patent in suit. In spite of the court's ruling that the relations between Wilson and Double were immaterial, or the like, the deposition of Willard given in the interference referred to concerning the subject of the patent in suit was admitted on motion of the complainants, and the testimony in that case [Qs 214-236, pp. 338-341, transcript] shows fully the bitter competition between the interests of Double and the interests of Wilson, including litigation between said interests over Wilson under-reamers.

Bole doubtless found a willing ear in Double for his scheme to apply for a patent on the Wilson reamer key and attempt to hold the same over the defendants in this case as he has been permitted to do by the trial court. We contend that it is clearly shown in the record of this case that Bole, even if he ever dreamed of this key for any purpose in the year 1908, never disclosed it to Wilson, and was not diligent in applying for a patent for same, and that Wilson independently invented the key, and was diligent, and instituted the practice of the invention which, by a matter of some twenty-two months, anticipated the Bole patent in suit. As a matter of fact we shall show that Wilson is proven to have disclosed the invention to Bole in 1911, immediately prior to Wilson's diligent reduction of the invention to practice.

IV.

**Bole's Case.**

Bole contends that he made the invention during September, 1908, while on a trip to Maricopa, California, during which he visited the shop of the Sunset Monarch Oil Company, where he took an order for a Wilson under-reamer and a Bole spear from Heber, who was foreman of the shop, and that then and there he disclosed the invention with sketches to Heber and to Adams, both friends of his, and sent in this order to the Wilson & Willard Manufacturing Company with a sketch of the description of the key. *The order, it is conceded, was never filled with any such key.* Bole further contends he disclosed the invention to Wilson

prior to the latter part of January, 1911, which is fixed at the time that Wilson came into possession of the invention independently of Bole, as we contend. It is also claimed by Bole that he was the first to pry out such a key from the Wilson under-reamer, this being put forth to support his contention that he invented the key. As to this the discredited witness Naphas testifies. This, in a nutshell, is Bole's whole case, with the exception of the matter of the alleged January 27, 1911, sketch, being the exhibit heretofore referred to, and which Bole claims he made on that date, signed, and obtained the signatures of the witnesses Fahnestock and Grigsby, then in the employ of the Wilson & Willard Manufacturing Company, the defendant, both of which witnesses—Grigsby being not now in the employ of that company—deny, to the best of their recollection, ever having seen the sketch before it was produced on the taking of proofs in the interference referred to. It is not contended that this sketch ever was shown to Wilson before the interference proceedings in 1914, and we will attempt, piecemeal, to dissect the same and to show what an enormity it is as a piece of evidence. Bole does not call a single witness to corroborate him in his alleged disclosure of the invention to Wilson, and Wilson denies it. It is conceded that Bole stood around for upwards of twenty-two months while Wilson diligently practiced the invention, prior to the application by Bole, and never raised a hand in protest or said a word in objection or in claim of proprietorship or origination until the letter of January 17, 1913, a few weeks before the settlement between Bole and

the defendant corporation. Irrespective of how the witnesses look or how they talk before the court—and it is to be borne in mind that the defendant Wilson, his former partner Willard, and his brother, W. W. Wilson, are substantial individuals in the community and in manufacturing circles—how can such an uncorroborated and unsubstantial story, and such a contradicted story, be given credence by the court? Bole is contradicted by Fahnestock and Grigsby; Naphas is discredited on the face of his own record; Adams is shown to be a strong friend and partisan of Bole and not to have received a full disclosure of the invention, even if he and Bole are believed; and Heber comes before us as a deponent unrecognized by the equity rules and offers his testimony in the shadow of the court house instead of in the court room and without giving the court an opportunity to see and hear him or the defendants to cross-examine him. And Bole is directly contradicted by Wilson as to his alleged disclosure to Wilson, and Willard entirely fails to corroborate him as to any disclosure of the key of the invention by the order sent in for the Wilson reamer from Maricopa in 1908.

As we have pointed out, Bole's proof, to make out his case, rests upon the testimony of only himself, his chum Adams, with whom he goes hunting, plays pool, etc., when they can get together; Heber, likewise an old friend; and Naphas, former manager of his pump business with the Wilson & Willard Manufacturing Company, and who ought to know if Bole ever made

any such invention as the key for reamers, as he claims to have made, but who does not testify anything about this, and who was not called as a witness in the interference, although Bole testifies in the interference that Naphas was present, he thought, at one of the times when he discussed this key with Mr. Wilson prior to Mr. Wilson's date of invention [Qs 76-81, pp. 599-600, transcript]. Bole claims that he explained to his brother-in-law, Hubbard, that he intended to do certain things for holding the lower end of the spring in the Wilson under-reamer, in 1908, but does not call him as a witness to the disclosure of his invention [lines 8-19, p. 577, record]. He also testifies that he showed the Bole sketch of January 27, 1911, to Austin, the shoe man, in February, 1911, he being a man in Los Angeles, and yet he does not call him as a witness [lines 22-26, p. 578, transcript], nor his father similarly.

We can readily dispose of Naphas, who is supposed to have seen Bole remove the key from presumably the first reamer built by Wilson including the key (and Bole built no reamer including the key in all the years he claims he had the invention), for Naphas fixed the time as being about the middle of February, or maybe a little later, in 1911 [lines 8-13, p. 615, transcript], and fixes the time as in February, 1911, because, he says, they were making four and a half inch pumps in March, 1911 [lines 3-27, p. 617, transcript]. W. W. Wilson testifies [lines 6-27, p. 679, transcript] that he was in charge of the office of the Wilson & Willard

Manufacturing Company, the defendant, in 1911, and that no four and a half inch pumps were made in the year 1911 for Mr. Bole or for the Bole Pump Company at the Wilson & Willard Manufacturing Company's shop. Naphas is entirely discredited by this testimony, and it is not attempted to show by any other witness that such pumps were being made there in that year. The testimony does not amount to anything in a way, for Bole may have pried out a key of the Wilson reamer after Houriet did, and the record shows clearly that Houriet was the first man to pry out this key, as we shall see.

Right at this point it may be well to pause and refer to the patent and point out what is the invention in this case. It consists purely and solely and essentially in the key feature, namely, the single-piece device which is inserted in the body of the reamer and through slots in the sides thereof and through a slot in the spring-actuated rod and held in place by the spring, having downly-directed shoulders forming a wing or projection to fit down into the body of the reamer and preventing the key from lateral displacement unless one end of it is lifted up so that the key can be driven out at the other end. When the key is in beneath the spring, the spring is held in place, and through it the spring-actuated rod, which carries the cutters or bits which play up and down and expand and collapse, in bringing the cutters into working position and in bringing them into contracted position for withdrawing the reamer from the hole, respectively. It will not be denied by appellees that Wilson had long previously,

at least as early as the year 1907, devised a two-piece key shown in evidence as Wilson Exhibit Photo A of Wilson Reamer Two-piece Key Device, and also reflected in Wilson Exhibit Photo B of Two-piece Key Device; that this was long used by Wilson, and that they were made at the shop in Bakersfield at the time Bole was working there; and that the genesis of the single-piece key invention is clearly associated with Wilson's efforts and not Bole's. And further, all of the other parts and features of the Wilson reamer shown in the patent of Bole in suit had been previously devised by Wilson and extensively manufactured and sold by him, and patented by him, Complainant's Exhibit B being a copy of the letters patent issued to Wilson in 1906, showing still other means for confining the lower end of the spring, namely, a block and screws or plugs for holding the block in the body of the reamer and provided with a hole through which the spring-actuated rod played.

Bole, therefore, attempts to show, by himself and Heber and Adams, and by the sketch of January 27, 1911, that he, Bole, invented this single-piece key, which was admittedly never manufactured or used by him, and which Wilson admittedly put into service and sold in his reamers, commencing work on the first of the same as early as February, 1911. It is Bole's contention that he made this invention while at Maricopa in September, 1908, and then and there disclosed it to Heber and Adams.

It is our contention that there is no proper testimony of Heber in this case, and he was not cross-examined,

and, of course, had the benefit of his experience in testifying in the interference and such coaching as he received afterwards. As to Adams, this alleged disclosure of Bole to him, and likewise as to the disclosure of Bole to Heber, was only fragmentary, and in Adams' case was by a sketch of the key drawn on the lathe with a piece of chalk [lines 9-12, p. 625, transcript]. He admits he has long known Bole, about twelve years; that he calls him "Bob," as Bole calls him "Gus," and that he would do a whole lot to help "Bob" out, they being close friends [lines 15-22, p. 626, transcript]. He admits that he also worked in the Bakersfield Iron Works, where the Wilson reamers were being made, and that they had this two-piece key, one of which held the other in place, and which was, in turn, held in place by a plug, and that he saw them there prior to September, 1908 [lines 23-9, pp. 626-627; lines 10-20, p. 627, transcript]. He likewise testifies that since September, 1908, he repaired reamers with this two-piece key, and worked on them, and since 1912 has seen a good many of the Wilson under-reamers, being the only under-reamers ever made with this single-piece key prior to the taking of testimony in this case, with such single-piece key contained therein [lines 22-3, pp. 627-628, transcript]. There is little doubt but what Bole in September, 1908, was discussing this two-piece key with both Heber and Adams, or at least that is our contention, inasmuch as he admits that when coming down to Los Angeles to testify in the interference that he saw the one-piece key in a sketch or drawing which Bole was discussing with his attorney, Mr. Lyon [lines

9-15, p. 629; lines 16-21, p. 629, transcript], and it is our contention that this one-piece key structure was put into Adams' mind at that time and there was thus cultivated the impression in his mind that it was this key Bole showed to him in 1908 instead of the two-piece key. It is significant that, although Adams testifies that they had had trouble with the two-piece key, no attempt was made to make any such single-piece key back in 1908 at the shop in Maricopa, for manifestly it would have been simple enough to make, and the record shows they had two-piece key Wilson reamers to repair in that shop after September, 1908, although they made two-piece keys at that shop [line 24, p. 631, to line 26, p. 633, transcript]. He admits this sketch of the key made by Bole, that he says Bole made on his lathe, was only there about ten minutes, and that he rubbed it out; that that evening he was with his friend "Bob" Bole and did not see him send in any order for a reamer, nor did they talk about a reamer that evening, and that he did not see him make out an order at all on that day or on that trip [lines 15-16, pp. 634-635, transcript]. He admits it was a greasy surface upon which the chalk sketch was made, but *that the surface* HAPPENED to be clean before "Bob" Bole made the sketch, and admits that he does not remember a thing written on that lathe in chalk that same year except this key sketch he is talking about [lines 19-12, pp. 637-638, transcript]. With the Heber deposition out of consideration, Bole has nothing to prove his possession of this invention before Wilson with the exception of this fugitive alleged chalk sketch

supposed to have been made nearly two and a half years before, and which produced no results either in the form of application for patent by Bole or manufacture of any such reamer with such key or repair of any reamer to include such key, and Bole himself was connected with the reamer-making shop of the Wilson & Willard Manufacturing Company and never saw to it that such a key was made, although Wilson would have grasped it with avidity, without doubt, had any such suggestion ever come before him, for he industriously went to work to utilize the key within a few days after he devised it, as we will point out in considering the testimony concerning his independent invention of this key.

We regret that the court did not permit us to put in evidence the deposition of Heber taken in the interference, which would have shown many reasons why it would have been desirable to have this witness before the court.

Bole testifies that he sent in an order to the Wilson & Willard Manufacturing Company for a reamer with such single-piece key, and an order for a Bole spear. It is admitted that the order for a reamer came in, and the order for a spear, in September, 1908, from Bole, and the records of the defendant corporation show such orders duly entered up, but no reference is made in any of those entries to such a single-piece key. Bole says he sent in his letter to Willard, but that letter could not be found, and if it was ever in the files of the Wilson & Willard Manufacturing Company the presumption is that Bole knows where it went. He

had full access for years to the records of that shop. In the interference proceeding Bole testified that this letter sent to Willard showing the key for the reamer with a sketch and description was sent to the Wilson & Willard Manufacturing Company [Qs 35-36, p. 591, transcript], and therefore not sent to Willard. In the present case he testified that he sent this order letter to Mr. Willard, who was getting his mail at his house on West Thirty-seventh place in Los Angeles [line 10, p. 492, to line 13, p. 493, transcript]. He says that when he returned from Maricopa he asked Mr. Willard about this order and Mr. Willard said Mr. Wilson (who was then in Bakersfield) refused to have the order filled. Mr. Willard testifies that the order was sent in to the shop of the Wilson & Willard Manufacturing Company; that there was not any sketch in that order that he can remember of, and that he cannot definitely recollect of any sketch or any showing other than the written part of the order, and that he cannot tell us anything of that sort that he remembers about that order any more than that he received the order for the different articles specified; that there was no delay incidental to the taking up of that work that he remembers, namely, the work on that order, and that he does not know that he communicated with Wilson, the defendant, about that particular reamer in any way, and that he has no such recollection, and that he does not remember having sent Mr. Wilson that order or any letter regarding it or any communication of any kind unless possibly he told Wilson over the telephone that he had had an order or that Bole had sent down

an order; that he does not remember telling Bole after he returned from Maricopa that he communicated with Wilson about that order and that Wilson had refused to make any change in the order, having no recollection as to that; and that a standard reamer was shipped on that order, not different from any other reamer made in the factory; and that he does not remember any complaint received from the Sunset Monarch Oil Company with respect to the nature of that reamer [line 1, p. 651, line 1, p. 516, transcript]. Willard testifies in the interference proceeding [Q. 303, pp. 354-355, transcript] that when he looked up the shop records two or three years previously to attempt to locate what was sent in with this order of Bole's from Maricopa, and when he could not find any written requisition or order from Bole, that the original order was missing. This was long before this controversy arose. Where did that order go to? It was long before Bole ever claimed to Wilson—which we contend was by the letter of January 17, 1913—that Bole was the inventor. Again, where did this order go to? Bole and Willard are shown to have been old, close friends, and yet Willard testifies squarely against his friend, his testimony strengthening in the interference case as he proceeds, he having a perfect right to change his testimony or increase its force and strength before the ending of his deposition. He testifies that he never saw any sketches distributed throughout the letter order of September, 1908 [RDQ 112, pp. 435-436, transcript], clearly contradicting Bole as to the sketches being sent in with this order, after having time to

think over the matter, and Bole and Willard, it is to be remembered, were frequently out on trips and at ball games together, on which occasions Bole discussed with him contemplated business plans or changes in devices that he had under way [Qs 63-65, p. 427, transcript].

Willard further testifies that there were no sketches in that letter or order, that he saw, under recross-examination [RXQs 165-167, p. 445, transcript].

So Bole is squarely contradicted as to this order letter alleged to contain sketches and description of the key constituting the essence of the invention of the patent in suit. There remains, then, as to any claim of Bole as to the invention, prior to the time when Wilson put the invention into practice, only the meager testimony of Adams and the fugitive chalk sketch on the lathe, and the improper deposition of Heber, these both produced from two old friends of Bole's, and this meager stuff is wiped out, in effect, by the contradiction of Bole's friend Willard. Wilson denies that Bole ever disclosed this invention to him, pointing out, as we have shown, that the first he ever heard of Bole's claim of such invention was by the letter of January 27, 1913, over four years after Bole claims to have made the invention. Wilson's denial that Bole ever put before him in any way prior to his making out the order for making over reamer 120 with the first single-piece key put into a reamer, as a design, construction or the like, or in any manner exhibiting or saying anything to Wilson about same, the key that he alleged he invented prior to that time, in lines 20-31, p. 96,

transcript, leaves Bole at sea, with no terra firma to stand upon as to his putting this invention before Wilson before Wilson independently worked it out and put it into practice, even upon the shadowy assumption that he had the invention or was in possession of it theretofore. This first reamer with the key was made over on an order, number 6904, placed February 3, 1911, as see Defendants' Exhibit Order Papers and Sketches Pertinent to the Making Over of Reamer 120, and order number 6904, together with the shipping envelope (respectively Defendants' Exhibits 6 and 7), and Defendants' Exhibit 8.

Bole's attempt to carry work on the invention in the shop of the defendant corporation prior to the work commenced on reamer 120 under Wilson's order of February 3, 1911, is reflected in line 7, p. 573, to line 17, p. 575]. In this he sadly fails and admits his error, for while he states he is positive about the first reamer because it is his opinion that the work started on that reamer before the 3rd of February, and he would say about the middle of January, when he is asked if it was made before his alleged sketch of January 27, 1911, he admits that he should judge he was wrong, and that he has no foundation for his statement that February 3rd was too late a date for the commencement of the first reamer with a single-piece key. *Of course, Bole would not be foolish enough to admit that anything was done about this key in the shop before the time he says he made a sketch of it; for it would be foolish to attempt to perpetuate a thing by means of any such sketch as that of January 27,*

*1911, if in fact it had been made on a shop order and that order perpetuated the transaction—unless it were to perpetuate the key remover, which is, on the very face of that sketch, the thing the sketch is supposed to show. It is very significant that this sketch was gotten up a day after Wilson says he first commenced to definitely work out this key, and that Bole says it was made in Wilson's shop. Without doubt he obtained any idea that he ever had of this key from Wilson.* Bole certainly stands peculiarly alone in attempting to make out his case of priority of invention or of any disclosure to Wilson.

BOLE'S EXHIBIT JANUARY 27, 1911, SKETCH.

Bole's only other physical evidence, aside from the postal card above referred to, which does not prove anything in point, or only helps to prove what we admit, that Bole was in Maricopa in September, 1908, is this remarkable exhibit, Complainants' Exhibit E, or the so-called Bole sketch of January 27, 1911. As to this sketch, which he says he made at the shop of the Wilson & Willard Manufacturing Company on January 27, 1911, a most significant thing is that upon its very face Bole is referred to as the inventor of a key-removing tool and not of the one-piece key itself. It is most reasonable to assume that Bole made this sketch after the invention in issue in this case was disclosed to him by Wilson, and to perpetuate Bole's idea of a lever for prying out the one-piece key. The first presentation of this sketch to vision stamps it as either an abortion or a monstrosity.

It is doubtful if ever there was previously offered in evidence a purported witnessed sketch of which the signatures of the purported witnesses occupied the central portion of the field, with the matter purporting to be witnessed tucked into one corner, and with the purported inventor's name beneath the purported signatures of the witnesses. The one thing that stands out in this sketch is the matter comprising the word "witness" and the writing "W. H. Fahnestock" and "E. F. Grigsby." It is significant the sketch was made in indelible purple pencil and the witnesses' signatures were made in black ink. This sketch is on an extremely small piece of linen, and the presumption is that, as neither Fahnestock nor Grigsby remembers ever having seen it before the interference proceeding, that the signatures of these purported witnesses were on the linen surface first, there being portions of the purplish indelible pencil matter superimposed upon the black signature lines so as to tend to prove this sequence; that the alleged witnesses' signatures must have been written upon the surface when it was part of a larger surface, as it would be impossible to hold the material of the exhibit in its present form and at the same time get between the fingers or anything else so holding it, and make the bold signatures appearing under the word "witness"; and no person could write the uncramped, bold, purported signatures of the alleged witnesses as they were written on a surface of this form and size, and that whoever wrote the word "Fahnestock" would, of necessity, and because of the well known personal

characteristic, common to all persons, have cramped the writing, at least toward the termination thereof, to prevent running over the right-hand edge of the surface. Probably Bole found these signatures on some drawing on linen, in the lower right-hand corner of it, where there is a finished selvage edge on the bottom of the linen, put in the matter above and below the signatures, together with the word "witness," and thus constructed this exhibit. Although in his testimony in the interference he does not say anything about trimming down this sketch from a larger surface, in the present case he testifies that there was a larger sheet of material when Fahnestock and Grigsby signed their names to it [line 17, p. 541, to line 17, p. 542, transcript]. This discrepancy in his testimony is extremely interesting, also his testimony that the tracing was made from a drawing [lines 1-6, p. 543, transcript], and that he supposed he destroyed that drawing. There is not a word said about this in his original deposition, which is in evidence. Grigsby testifies that the first time he ever saw this sketch, Complainants' Exhibit E, to his recollection, was in Mr. Lyon's office, the attorney for the complainants, at the time Mr. Lyon was taking testimony for Bole in the interference case, which was in 1914 [lines 4-17, p. 661, transcript]. Fahnestock testifies that the first time he ever saw the sketch was when he was called upon to testify in the interference proceedings in 1914, to the best of his knowledge [lines 10-15, pp. 665-666, transcript]. Grigsby does not remember ever signing on tracing paper for anyone [lines 24-32,

p. 661, transcript]. This piece of evidence, namely, this sketch, Complainants' Exhibit E, therefore goes begging, with no support but Bole's own testimony.

In order to show that whatever Bole did get up, if he got up anything pertinent to this lever for removing the key, although the record shows such levers were in use in this shop for other purposes prior to January 27, 1911, was of no account anyway, a key and lever drawn accurately to the scale of these parts shown in this sketch having been produced and put by defendants before Bole on his cross-examination and Bole admitted that they were practically the same as the sketch, and he was then asked to say if that key is the same size as the key in the Wilson reamer in evidence, Defendants' Exhibit 1, or Defendants' Exhibit Single-piece Key Reamer, and he replies that he finds that it is. He then is asked to attempt to remove the key and says there is no opportunity to get the lever in under. He then admits that he does not know that he ever intended to use it, but got it up with the idea of protecting it, but never did anything further towards protecting it, never having applied for any patent upon it [line 6, p. 536, to line 1, p. 539]. In other words, whatever Bole did get up, if anything, pertinent to this key, is this lever which he copied from a lever already in the defendants' shop, and this would not work to remove the key. The very thing this sketch of January 27, 1911, purports to show or disclose on the claim of Bole's inventorship is a lever which is useless for the key which Wilson devised. When this sketch was made there is no reasonable proof. It

very well might have been made after Bole had his rupture with Wilson and the attempt was made to pirate upon the business of Wilson, Bole being backed up in this by Wilson's bitterest competitor, Double, of the Union Tool Company.

### Bole Applied for Patents for Other Things.

Apparently Bole considered this key invention, if he ever devised it, to be of so little importance that he did not apply for patent on same until Wilson had thoroughly incorporated the key in his reamer business, so that he could parasitically advance upon Wilson's established business. That it was Bole's practice to file applications for patents for other things is clear from the record. [See lines 1-9, p. 556, transcript.] See also line 20, p. 533, to line 19, p. 534, transcript, which shows that in one case in 1906 or 1907 Bole was particularly diligent about applying for patent the very day he evolved the idea.

### Bole Admits January 27, 1911, Sketch Was to Perpetuate Key Remover and Not Key.

This highly significant admission is made in line 10, p. 532, to line 19, p. 533. This testimony ties the witness down as to anything in his claim of invention as reflected by this sketch to the lever and not to the key, for he says that he thought, on January 27, 1911, he had invented a new key remover, and that he did not think this better than the key remover he claims he originated in 1908, namely, the system or method of driving a drift under and then driving out the key;

that as a matter of fact he thought the drift was best, that being what was finally adopted by the Wilson people. Apparently he did not think much of this alleged key-remover, which we have shown could not remove the key anyway, by Bole's admitted demonstration in the court room, and as it was already in the shop of the Wilson people in substantial equivalence, he must have known that he had not really invented anything. Such a lever is in evidence as Defendant's Exhibit 9, namely, the lever previously used in the Wilson shop.

That complainant's attorney must have considered this Bole January 27, 1911, sketch peculiar and suspicious is seen from the testimony of the witness Adams [line 9, p. 629, to line 23, p. 629, transcript]; for it seems that when Adams came down to testify in the interference he saw this sketch, and Bole was discussing it with his attorney, Mr. Lyon, and comment was made upon the contrast between the signatures and the drawing.

Another significant thing about this sketch is that Bole testifies he explained the key-remover and key to Fahnestock and Grigsby at the time they are alleged to have witnessed the sketch, and yet, with all the importance that attached to the coming in of the new single-piece key reamer in the Wilson shop, these witnesses cannot remember having ever seen the sketch before testifying in the interference suit years afterward. It is significant also that Bole explained, as he says, to Fahnestock and Grigsby, that it was a *key-remover* shown in the sketch. He doubtless had never

known of the key until Wilson produced it and displayed it to him, and all he was considering in and by this sketch, if it was ever produced anywhere near the time he says it was, was the key-remover, which was a useless thing anyway, and which anyone would be apt to forget, or at least anyone in the shop where the similar lever to that in evidence was known, although Fahnestock and Grigsby would not have been likely to have forgotten any such sketch if it pertained to the important single-piece key. It is significant, further, that Bole cannot remember anything that Fahnestock and Grigsby had to say at the alleged time of disclosure of the sketch [line 13, p. 540, to line 3, p. 541; line 26, p. 577, to line 13, p. 578, transcript]. We contend there never was any such disclosure.

### Bole's Sum Total of Proofs.

Fairly and reasonably marshalling together the offered proofs on behalf of complainant, we find the following evidence:

Bole's Deposition:

Squarely contradicted and discredited by Wilson, Willard, Fahnestock and Grigsby, and only partly supported by Adams and the improper deposition of Heber, Naphas' deposition being rendered worthless by contradiction.

Bole's January 27, 1911, Sketch:

In effect disproven by Fahnestock and Grigsby, the alleged witnesses thereto.

Bole Postal Card Mailed to Heber:

Unchallenged so far as it tends to establish the fact that Bole was in Maricopa during September, 1908, which we admit.

This whole case must fall or stand with Bole's deposition, about which all the rest of the purported evidence clusters; and Bole being discredited and contradicted, and the January 27, 1911, sketch being discredited, this court is asked to find for appellees upon the evidence of an unimpeached postal card.

Again we assert that this court must believe *all* of appellee's witnesses, and that Bole's father, and Austin, the shoe man, and Hubbard, who were not called, would have corroboratively testified; and must disbelieve practically *all* of appellants' witnesses, in order to affirm the decree of the lower court.

*Again we reiterate that the lower court erred in finding Bole an original inventor, in finding that Bole ever disclosed the invention to Wilson, in finding Bole a prior inventor if, in fact, he was an original inventor, because of the diligence of Wilson and the total want of diligence of Bole, and in finding that the Bole patent was not, in fact, anticipated and void because of the admitted diligent reduction to practice by Wilson and its long continuance in the presence of Bole during a period of some 22 months before Bole applied for patent, and in not finding that Bole obtained all his knowledge and information about the invention from Wilson.*

It was a most remarkable thing for Bole to rely upon

Wilson and his company to preserve his record, if he ever made one, pertinent to the original invention of this key, and at the same time permitted Wilson to manufacture the reamer month after month and vigorously assert his claim thereto without protest and without filing any application for patent. The Patent Office has twice passed upon this same issue of originality and novelty of the key invention as between Bole and Wilson, both times finding Wilson to be the true, original and prior inventor, this interference record being before this court in Defendant's Exhibits, Certificate of Patent Office as to Wilson v. Bole Interference, Certified Copy of File Wrapper in the Matter of the Application of E. C. Wilson in Improvement in Under-Reamers, and the decision of the Examiner of Interferences in the Patent Office finding Wilson the original and prior inventor of the issue of the patent in suit. At the hearing there will be produced for filing certified copy of the decision of the Board of Examiners in Chief affirming the opinion of the Examiner of Interferences, and the court will be asked to receive and consider or take judicial notice of the same, it being a certified record of a decision of a department of the federal government.

## V.

### Wilson's Independent Diligent Anticipatory Activity and his Disclosure of the Invention to Bole.

We turn now to the record in this case showing the independent and diligent anticipatory activity of Wilson in and about the invention and his disclosure of the

invention to Bole, all dating back in initiation to the last part of January or first part of February, 1911. It is to be borne in mind that Bole is supposed long before to have disclosed the invention to Wilson. Had he so done is it likely Wilson would have slept upon the advantages of this invention, which, in its attractiveness in the trade and field, was so superior an advantage to the old block-and-screw or pin type of spring-confining means and the old two-piece key-and-plug type of spring-confining means,—had as a matter of fact this invention been before him at a prior time?

We will now dissect the testimony of the witnesses for Wilson, bearing in mind that Wilson was the man logically and naturally to produce this invention, inasmuch as he had produced the earlier just-mentioned types of spring-controlling means, and that he, and not Bole, was the reamer-maker, and had been for years, and that it is not shown that Bole ever made a reamer or ever reduced to practice in any manner the invention of the patent in issue.

E. C. Wilson testifies generally as to the nature of his business and that of his company and of his commencement of making reamers back in the year 1904, this testimony showing that he has been closely identified for years with the oil well tool and under-reamer business, and that he has had a training at Stanford University following a public school education [line 28, p. 78, to line 19, p. 94, transcript]. Beginning with line 13, p. 88, and thence continuing on, he testified as follows: That the first order for a reamer with a single-

piece key like that in Defendant's Exhibit Wilson Single-piece Key Reamer, was made up on February 3, 1911; that it was dictated by himself in the office of the Wilson & Willard Manufacturing Company, the defendant, and, when typewritten in the usual form, was sent to the foreman for execution; that William G. Knapp was the foreman of the shop at that time but is not now connected with the shop. The order is produced and is in evidence, together with the companion order, the first being order No. 6904 and the second being order No. 7056 (see Wilson Exhibit February, 1911, Wilson & Willard Manufacturing Company's Shop Record Slips; and Defendant's Exhibits 6, 7 and 8). The latter order, 7056, was made up by Mr. Knapp, and the testimony of Houriet and Ridgren, workmen in the shop, and of Knapp, the foreman, and Willard of the defendant company, all establish the making up of these orders and the execution of the same in the shop. Wilson gave orders, and made a sketch of a Tee for the reamer, and turned it over to Mr. Knapp, at the same time giving him instructions in regard to the type of spring to use and also in regard to the one-piece key which was to be used in that reamer; and that the reamer was changed over, reamer 120, which was a reamer of the old style two-piece key type, into a single-piece key reamer as per his instructions, a larger Tee being made, a larger spring, and a one-piece key like that of the issue, and the lower end of the under-reamer body being drilled out to fit in a safety bolt. He testifies that there was considerable trouble in removing the key, and it was

one day discovered by the machinist Houriet that by simply driving a wedge or the pointed end of a file underneath this key he could pry it up to such a position that the operator could drive it out from the opposite side. It seems that Wilson had always been somewhat troubled about removing the key, and Houriet's solution settled the matter. It will later be seen that Bole, when Wilson disclosed the key to him, suggesting prying it up and driving it out, presumably in line with his ideas about the lever, but that this was not the method adopted [line 21, p. 94, to line 31, p. 97, transcript]. Upon this misadvice Bole rests probably all his foolish contention that he had something to do with designing the key, while he only suggested an unadopted and improper method of prying it out. It seems that this reamer was not sold until along in the early summer, and was shipped to the Norbeck & Nicholson Company in Dakota [line 17, p. 98, to line 12, p. 100, transcript]. It seems that a drawing was made showing the key, by tracing the outline of the key of reamer 120, in evidence with the other record papers pertinent to reamer 120, and whereby were preserved the dimensions of this key, such sketch showing the key to have been completed by April 22, 1911, the witness testifying he made the outline of the key on that date [Knapp testimony, lines 11-6, pp. 213-214, transcript]. The witness E. C. Wilson testifies that he was president of the defendant company when this work was done on reamer 120 to include the single-piece key, and then goes on to testify that the first he had to do with the single-piece key device was specifically in

January, 1911, although as early as 1906 it had occurred to him as an idea, and on many occasions before the order was made up on February 3, 1911. He then goes on to state that on January 26, 1911, he received an order from the Pacific Iron Works of McKittrick for an old style slotted Tee for 12½ inch Wilson under-reamer to be shipped by express; that the order was filled on that day, and that he was surprised to find that there was a reamer of that type still in use; that he had abandoned the use of the slotted Tee on account of the weakness of the Tee, it breaking through the slot; that he had depended upon a draughtsman whom he had employed when that reamer was first constructed to so apportion the Tee as to lay it out to the working size of the drawings as to give that Tee all the strength possible, but that the breakage of those Tees caused him to abandon the use of them and to go back to the block-and-screw type; so that this order received in January, 1911, again brought to his mind the possibility that there was merit in the Tee, and for the first time it occurred to him that it was barely possible the draughtsman had made an error in his dimensions and had not made the Tee as strong as it could be made; that Wilson went over to a draughting board and himself laid out one of the Tees of the slotted type, increasing its size and making it the size he had discovered when he commenced to work on it himself that it could be made; that he was surprised to find that it was fully twice as strong as those they had made; that he then made up his mind that he would go back to the slotted Tee type, using the larger pro-

portions; that with that idea thoroughly settled he checked up by comparing his figures with those of his brother's, they going over it very carefully *January 26, 1911,* and he then made up his mind that it was possible to make a single-piece key which might overcome a few of the minor troubles they had had with the double type key; that the idea he had back in 1906 and 1907 then occurred to him and he pondered over that idea. Pondered over that idea and keys three or four days, making sketches of them and thinking them over and studying them over at home, and could not determine in his own mind which was the better form of those keys to try out first in this new type of reamer; that he finally concluded one day to call some of the boys together and get their opinion as to which would be the better type of key, and that some time about February 1 or 2 or 3 he called some of the boys together and explained to them that he was going back to the slotted Tee type, having become satisfied that it was the best, and having discovered that he could increase the strength of the Tee so that that trouble could be settled and overcome, but that he was not sure which style of key he could use; that he then produced some little sketches which he had, which he had been thinking over, and said, "Here are the different ideas I have," and one of which would have to be held in with a plug and another one probably with two plugs, and one dispensing with the use of the plug at all, but with a key, and while he could see that it was stronger and probably more convenient to put in place, he was uncertain as to the best method of re-

moving it from the reamer when it was in place, the tension of the spring being very great and it being a particularly difficult matter to get the key out. Reproductions of these sketches he made are in evidence as "Defendant's Wilson Reproduction Sketch of Sketches of Late January and Early February, 1911"; that in the conversation, at which Mr. Wilcox, his brother, W. W. Wilson, and Mr. Bole were present, and he thought Mr. Knapp and Mr. Willard, he said, "Here is the best key. I can see that. It will stay in the reamer without the use of any plug at all, but we will have trouble to remove it"; that at that juncture Mr. Bole suggested to pry it out, but that he said, "Very well. We will admit that it can be pried out, but won't it give so much trouble in doing so that it will probably condemn it and drillers won't use it?"; that Bole said, "No; I can devise a tool that will pry it out"; that Wilson said, "I can devise a tool that will pry it out, but I think it will give us a good deal of trouble"; and that after further discussion the boys agreed with him that that was the better style of key and it was well worth trying, and that with that point settled they proceeded to make up a single-piece key as he desired, and that that was the genesis of the key, and that he had some little sketches which he put before these persons at the time mentioned, in February, 1911, *"which he had been carrying around for several days,"* and that it was in this way he submitted these ideas to these men for their consideration, and that he does not think he preserved these sketches at all, but that the key was probably made up from one of the sketches he

showed the boys at the time, one of the original sketches. The reproduction sketches in evidence were offered in the interference. The witness then tells the court what the various sketches represent [line 2, p. 104, to line 26, p. 112, transcript]. The witness then refers to a copy of a letter he wrote to Williams of the Pacific Iron Works at McKittrick on the day he received the order, namely, January 26, 1911, fixing the time of his commencement to work over the underreamer to include the single-piece key [line 27, p. 112, to line 19, p. 115, transcript]. The witness also produces a letter which he received from Mr. Williams in response to his letter, the same being dated January 28, 1911, and which further fixes this time and is in evidence as Defendant's Exhibit Pacific Iron Works Letter of January 28, 1911 [line 20, p. 115, to line 25, p. 116, transcript]. The witness now identifies the parties Willard, Knapp, Wilcox, Bole and W. W. Wilson, who were present at the conference in the first part of February, 1913, about the key, W. W. Wilson being his brother, Robert E. Bole being the party for whom the company was then making pumps (Bole, complainant), C. E. Wilcox, a salesman, and Knapp, the foreman, and Willard, his partner in the defendant corporation [lines 27-8, pp. 116-117, transcript]. Witness also produces an order dictated by himself on receipt of the order from the Pacific Iron Works of McKittrick on January 26, 1911, the date of the shipment being the same day, the slips being in evidence as Defendant's Exhibit Pacific Iron

Works, January 26, 1911, Shop Order Slips [line 9, p. 117, to line 5, p. 118, transcript].

The witness then produces the shipping receipt of May 25, 1911, for the shipment of another under-reamer, 496, with a small lever attached, shipped to the Kern Trading & Oil Company at Kerto, California, May 25, 1911, a reamer commenced after reamer 120 was made over, the shipping receipt being in evidence as Defendant's Exhibit B [line 6, p. 118, to line 11, p. 119, transcript]. The witness then testifies [lines 12-8, pp. 119-120, transcript] that he received his knowledge of the single-piece key in issue from his own conception, and that subsequent to 1906 or 1907 and prior to the time he made preparations for making over reamer 120 he received from no other source any information or knowledge with respect to such single-piece key. *This is a clear denial that Bole ever conveyed any such information to him;* also that he had never seen such a one-piece key prior to the time last mentioned, or prior to February 3, 1911, and that, prior to February 3, 1911, he had never seen a cut or drawing or any descriptive matter disclosing any such one-piece key excepting those he had made himself; and that prior to February 3, 1911, no such single-piece key was ever described to him by word of mouth or otherwise by any other person [line 12, p. 119, to line 3, p. 121, transcript].

It is perfectly clear from this testimony, which is thoroughly corroborated, as we shall see, by Willard, W. W. Wilson and Wilcox, that Wilson definitely and finally conceived of this single-piece key in issue about

January 26, 1911,—*which is a day before the date of the Bole January 27, 1911, sketch;* that he made sketches of that key and several others within a few days of that time, and on or before the 3rd of February, 1911, he disclosed these sketches to Bole and Wilcox and W. W. Wilson at least, and that all Bole ever had to do with that key was the futile suggestion to pry it out, as reflected in the dubious January 27, 1911, sketch, and which suggestion was never adopted because Houriet showed how to pry the key up and drive it out. The defendant Wilson then goes on to testify that his business in under-reamers has run up to from 600 to 800 of them, and that probably two hundred of them were made with the one-piece key before February 19, 1913, when Bole applied for patent; and then produces blue prints showing the practice of the shop in making reamers with the key of the issue away back as early as May and June, 1911. The witness testifies that he has seen Wilson reamers in operation as early as the year 1911 [line 4, p. 121, to line 16, p. 124, transcript]. These blue prints or tracings of the same are in evidence as "Shop Tracings of May and June, of Wilson Under-Reamer with the Single-Piece Key." The appellees conceded on the record that the appellants have been marketing the invention since June, 1911, and advertising and selling it, and that they had been successfully operating it as early as July, 1911 [lines 1-19, p. 128, transcript]. The witness then proves extensive circulation of booklets advertising the invention, several thousand of them being printed and mailed to different

oil companies throughout California and the eastern oil fields and foreign oil fields [line 4, p. 129, to line 29, p. 130, transcript].

All of this shows that Wilson was diligent in putting the invention into practice and selling it and advertising it, Bole not having been shown to have ever done any such thing at all. This testimony also speaks clearly for Wilson's independent act of invention of the issue of the patent in suit and for his disclosure to Bole instead of any disclosure by Bole to him, and shows a clear anticipation of the Bole patent by Wilson's manufacture and sale of the reamers and advertising thereof, and the use thereof, and leaves Bole with nothing but the figments of imagination attaching to his earlier alleged and abandoned invention of 1908 at Maricopa.

Upon the record there appears a letter [pp. 153-154] dated February 28, 1911, written to one J. A. Kibele, at Bakersfield, California, describing the new reamer with a single-piece key and prophesying what a success it would be and referring to the prying up of the key and the driving of it out. Of course the reamer had not been completed at that time, and what was stated was prophetic, but it shows the completion of the invention as far as Wilson's conception and disclosure and the commencement of reducing to practice are concerned. It must be remembered that the reamer with the key of the invention was not completed until at least in April, 1911, which was well within the two years permitted by the statute within which to file applications for patent, *and it was not incumbent upon Wilson to apply for that patent, as he did, in March,*

*1913, until just before the expiration of the statutory two years, as he was vigorously asserting his right to the invention by manufacture, sale, and advertisement of it. With Bole the case was different. If he ever was in possession of the invention it was his duty to speak out to Wilson the moment Wilson commenced to use the invention and to apply for patent thereon without letting laches run against him and allowing Wilson's business good will and rights to pile up.*

Complainants tried to tangle the witness Wilson with respect to his calling of the various parties together for the key conference above referred to. Whether or not they were singled out and invited separately or found together in a group in the shop is immaterial. The fact that they were gotten together is what is significant in the case as to this incident. It is our contention that the lengthy cross-examination of this witness fails to break down his direct examination. He shows on redirect examination that the question of prying the key out was probably repeated by Wilson several times during the course of the time that he moved about in the shop from place to place as he was discussing this matter, the parties walking around near the shipping desk and near the shaper in the shop [line 18, p. 193, to line 13, p. 195, transcript]. The witness testifies [lines 5-14, p. 197, transcript] that Bole never showed him any tool for prying the reamer key out. It is not claimed that he never showed him the alleged January 27, 1911, sketch either. The witness testifies that, in spite of Bole's uncorroborated testimony that he, Bole, had been working up a single-

piece key for a reamer, he, Wilson, did not know and was not told that Bole had been working on a single-piece key, but was only told Bole had been working on a lever for prying out the single-piece key. It will be remembered that Bole tried to make out that there was an earlier key made than that for reamer 120, and that he admitted that he was in error as to such incident.

The testimony of Knapp [pp. 199 to 219, transcript] fully corroborates Wilson as to his foremanship during 1911, as to the making of the first single-piece key in 1911 for reamer 120; that Ridgren, Berg and Houriet worked on it, and that *reamer 120 was made over under instructions from the defendant Wilson given to himself;* also that these instructions were verbal, Wilson taking him over to the side of the shop where reamer 120 was standing and explaining to him that he was going to try a one-piece key in the reamer, Wilson at that time taking a pencil and drawing on the palm of his hand a sketch of the key [lines 11-18, p. 201, transcript]. He then refers to former interference reproduction sketch of the key, in evidence as Defendant's Exhibit Knapp Single-Piece Key Reproduction. Knapp then goes on to identifying order 6904, and his receiving the same, and first seeing it February 3, 1911. He then describes the papers pertinent to this order 6904 and order 7056 dictated by himself and turned in by himself March 8, 1911. These slips show Knapp's initials, that he charged to the reamer account on order 6904 for the labor performed on that order [lines 6-10, p. 205, transcript]. He then

identifies the slips turned in by workmen engaged on that order, identifying also the times the slips were turned in. Knapp then testifies that to his knowledge Robert E. Bole, the complainant in this case, gave no instructions or assistance by act or word of mouth in connection with making over reamer 120 to include the single-piece key, which is the first single-piece key shown in this record to have been made for an under-reamer, and shown to have been made under the directions of E. C. Wilson, whom the Patent Office has twice found to be the inventor thereof. Knapp also testifies that Bole at no time submitted to him any sketch or drawing or outline of such a single-piece key prior to the completion of this making over of reamer 120 [line 16, p. 209, to line 10, p. 210, transcript], and also that he, Knapp, received no instructions as to the making over of this reamer 120 from anybody other than the defendant E. C. Wilson. Knapp further testifies as to the shipping of this reamer to the Norbeck & Nicholson Company in Dakota, placing the time as June, 1911. Knapp positively fixes Al. Houriet, the workman in the shop referred to by Wilson in this respect, as being the man who first took out, with the tang-end of a file, the single-piece key from this reamer 120, he being one of the machinists in the shop, and that Knapp saw him do it [line 17, p. 211, to line 16, p. 212, transcript]. At this point Knapp refers to the making of the outline of the key on the brown paper drawing which showed the Tee-bar that was used in reamer 120, making the same on April 22, 1911, for a shop record [line 17, p. 212, to line 6, p.

214, transcript]. Knapp clearly establishes this reamer 120 as the first to use the single-piece key, and also testifies that prior to the making over of this reamer 120 he had never seen or had any knowledge of an under-reamer containing such a single-piece key. Manifestly, Bole never had anything to do with this first key, and never knew of a single-piece key until this one was made [lines 7-21, p. 214, transcript]. The red marks on the brown paper sketch having the Tee and key are shown to have been made by Knapp in the office of the shop of the defendant corporation, and the key sketch was some month or six weeks after the key was completed, the notches shown in the key having been originally intended for using with a tool to pry the key up, but these notches having been abandoned after making not over one-half dozen of the keys for Wilson reamers, as they found it was not necessary to use them, for by driving a wedge-shaped tool underneath the key it would raise it enough so that you could drive it out. This brown paper sketch is specifically in evidence as Defendant's Exhibit Wilson Reamer Tee and Key Sketch of 1911 [line 23, p. 216, to line 24, p. 218, transcript]. The original reamer, fully proven as it is, and not controverted as to its manufacture, is not attempted to be introduced in evidence, and, having been shipped to South Dakota, was not available and doubtless could never have been produced, inasmuch as these reamers more or less rapidly wear out and are discarded for new ones. We have admissions as to the extensive manufacture and sale of Wilson reamers anticipatory of Bole, and the

record as to this reamer is so full and complete that there never has been any controversy with respect to its completion and shipment, nor can there be any controversy as to the details of its construction. The witness Knapp tells a clean, consistent, corroborative story, and is under no compulsion or influence of the defendants, as he was not in their employ at the time he testified. This witness testifies also that there was a lever shipped with reamer 120, the first single-piece key reamer, and that levers like it had been in the shop of the defendant company prior to that time, they having used a similar lever for raising the block and compressing the spring in the old-style block-and-screw type under-reamer, and it had been in the shop substantially a year and a half [line 27, p. 230, to line 20, p. 231, transcript]. It is manifest, as above pointed out, that Bole never invented even the lever that he says he attempted to perpetuate by the January 27, 1911, sketch.

Albert W. Houriet testifies in corroboration of Knapp and Wilson as to the making of the reamer with a single-piece key, that is, making over reamer 120, as early as the middle of February, 1911, and how he first tried to pry out the key, and that he then told the foreman, "I guess you don't need no lever to pry it out. Here is a simpler way to get at it"; that he took an old file there and drove that in and said, "You take the tang end of the file and drive it in, and then you can drive the key out," and that he told foreman Knapp about it after he found he could raise the end of the key that way; that he had never seen a sin-

gle-piece key like that driven out that way before, clearly showing that there was nothing to Naphas' testimony about Bole removing the key. He fixes the time as later than February 22, 1911, when he first drove the file under the single-piece key and raised it up and then drove it out [line 9, p. 473, to line 15, p. 477, transcript]. His testimony is not broken down in any sense, and is remarkable testimony for a machinist working in a shop and remembering back three or four years in the routine work of his mechanical experience. He testifies that he received his instructions for working on the single-piece key from the foreman, and thus we see Bole had nothing to do with it.

Fritz R. Ridgren, another witness, who worked on the single-piece keys for Wilson under-reamers, testifies that he made the first one in the early part of 1911. He is not now working for the Wilson & Willard Manufacturing Company, although he was then. He testifies that he got a sketch from someone, although he does not know who gave him the sketch, but there was a rough pencil sketch on a piece of wrapping paper handed to him. This must have been a sketch furnished by Wilson through Knapp, for the keys that he made in conformity to this sketch were all of the same thickness or strength as to any one size reamer, thus rebutting Bole's uncorroborated testimony as to his work on a thinner original key, which of course would have to be forged in the shop by Ridgren had it been made there, as Ridgren testifies there was nobody else that made any keys except him that

he knew of. Bole practically admitted he was in error as to this earlier key, as previously pointed out. Thus Ridgren carries the single-piece key matter back to the early part of 1911 [line 17, p. 687, to line 10, p. 690, transcript].

It is significant that this testimony of Houriet's clearly corroborates Wilson's and Knapp's as to the wedging up the key with a file in reamer 120, the first single-piece key, so that it could be driven out, whereas Bole stands all alone in his testimony that he took the file and took the key out, and that Houriet was present [lines 17-8, pp. 694-695, transcript]. Houriet is established as the man who pried up the key with a file, and not Bole. Bole is defeated in every attempt to intrude himself into this controversy as having had anything to do with the first key or any key of the single-piece type involved in the patent. Naphas is contradicted, and Bole is contradicted, and there is nobody to support Bole in these contentions.

The testimony adduced by the court in examining the defendant Wilson clearly shows how in error Bole is and how correct are Houriet and Knapp as to this incident of prying out the key [line 11, p. 669], to line 20, p. 700, transcript].

WILCOX, W. W. WILSON AND WILLARD FULLY CORROBORATE WILSON AS TO CONCEPTION, SKETCHES AND DISCLOSURE OF THE INVENTION OF THE PATENT IN SUIT IN THE LATTER PART OF JANUARY AND FIRST OF FEBRUARY, 1911:

Willard was fully conversant with reamer 120 and its making over to include the single-piece key, and identifies the shop order upon which this work was done, that being the first reamer having such a key, the first slotted tee as called for by the slips of the order for reamer 120 being made in the early part of 1911 [Qs. 94-115, pp. 317-320, transcript]. Willard clearly corroborates Wilson as to the events leading up to the designing of the heavier slotted tee-bar associated in time with the correspondence with Williams of the Pacific Iron Works of McKittrick, stating that Wilson said to him upon receipt of the letter from Williams of January 28, 1911: "Could it be possible that the slotted tee-bar—could it be possible to make the slotted tee-bar strong enough;" and it was about that time that Mr. Wilson was working at the board, the witness referring to Defendant's Exhibit Pacific Iron Works Letter of January 28, 1911 [Qs. 134-146, pp. 325-326, transcript], and that prior to the commencement of work upon shop order 6904 for making over reamer 120 he had never seen a sketch of a single-piece key for an under-reamer. Clearly, Wilson commenced to work up this single-piece key independently in the last week of January, 1911.

Charles E. Wilcox testifies that he was, by occupation, an oil-well driller, and had used under-reamers

and the like, and that he was connected with the defendant company from about the first of January, 1911, up until this year, having severed his connection with that company about the first of February; that he sold under-reamers, elevators and circulating heads for the defendant company; that he first saw a Wilson under-reamer having a single-piece key between the first of January, 1911, and the first of March at the defendant company's place of business; that he saw others of the same general construction, including the one-piece key, during the years 1911 and 1912 made by the defendant corporation; that he has seen such a Wilson under-reamer in operation; and that he first saw such a Wilson under reamer in operation along in 1911 in the California oil fields, seeing them lowered in the hole and removed from the hole, the cutters being changed, etc., permitting the casing to be lowered after the hole had been reamed (which is the intent in the use of an under-reamer); and that approximately fifty times he had seen such use and operation of the Wilson under-reamer during the years 1911 and 1912, and that they were successfully in use, the complainants not controverting such successful operation [lines 29-31, p. 240, transcript]. From this point he goes on to state that such a single-piece key for reamers first came to his knowledge, or that when he first heard about it, was when he heard Mr. Wilson discussing something in regard to a key *shortly after he got a certain letter from Mr. Williams of the Pacific Iron Works of McKittrick, California* [line 18, p. 242, to line 26, p. 243, transcript]; that he saw sketches of a key only a few days

after he heard little bits of conversation in regard to the letter, thus clearly corroborating Willard and Wilson about the letter of January 28, 1911, from the Pacific Iron Works at McKittrick; that E. C. Wilson and R. E. Bole and A. G. Willard were standing at a desk only a few days after he heard about this letter, such desk being used for a shipping clerk's desk, and he was standing about four or five feet from them, or six feet, or maybe ten; that Mr. Wilson had a sketch on a yellow piece of paper of a key similar to the one that is made now and used in the Wilson reamer, this being in the shop of the defendant company, the shipping desk being at the north end of the shop, or at the rear, and about eight feet, he would say, from the center of a door-way, and that there was a planer or shaper nearest that desk; that Robert E. Bole was one of the complainants in this case and Mr. Wilson one of the defendants in this case; that he had never since seen this sketch that Mr. Wilson had, to his knowledge, but that he has since that time attempted to reproduce the sketch he saw then during the taking of testimony in regard to the interference suit; and the witness, upon being handed a sketch entitled "Wilson's Exhibit Charles E. Wilcox Key Reproduction Sketch," dated June 19, 1914, states that was the sketch that he made at the time of the interference in reproduction of the sketch he saw Mr. Wilson hold in the shop at the time under consideration. This sketch is in evidence as Defendant's Exhibit Charles E. Wilcox Key Reproduction Sketch, and clearly shows the key of the issue; that this sketch he drew in trying to produce a sketch as nearly as he could from memory

of the one that Wilson had in his hand at the time at the shipping desk [lines 8-10, p. 246, transcript]; that he stood only a few feet from Wilson when he saw this sketch in Wilson's hands.

To interpose, Bole had free run of defendant's shop during 1911 and 1912. This clearly shows in the testimony of Willard given in the interference [Qs. 63-68, pp. 312-313, record], and he had full access to the records of the company and had the confidence of those in charge. In spite of all this confidential relation, he never protested to Wilson against Wilson's use of what he is now claiming was his key invention.

Wilcox further goes on to state that at the time of this occurrence Wilson, Bole and Willard finally turned around and away from the shipping desk and stopped right opposite him, and Wilson had a piece of yellow paper in his hand and a pencil, and said, "Oh, I know how to get it in there, but I don't know how to get it out," and Bole said, "Pry one end of it up and drive it out," and that they passed on out of his hearing and that is about all that he heard at that time [lines 28-9, pp. 247-248, transcript]; and that on the yellow piece of paper which he saw Wilson hold at that time there was a sketch of a key. The court asked the witness how he came to see this sketch, and he said that that would be the same as if a man came walking by here and stopped within two feet of him and was standing there talking about it, holding it that way in front of him, and he would look over and see it. The witness further states that W. W. Wilson and Knapp, foreman of the shop, were over by the

door, about five or six or eight feet from the desk, W. W. Wilson being a brother of E. C. Wilson; that about ten minutes would cover the period of time with relation to this group of people and this talk about putting a key in and prying it out and his seeing the sketch as he says he did. The witness then testifies as to the presence in the defendant's shop as early as 1910 of levers like Defendant's Exhibit 9 or Wilson Reamer Block-Elevating Levers, and that the same were used when they first commenced making the present type of reamer, in trying to take the key out with a tool something of the same order, and that he saw such attempts [line 2, p. 236, to line 21, p. 251, transcript]. This testimony we believe sounds and rings genuine and true, and we solicit the court's careful examination of it. The cross-examination of this witness is an attempt to impeach the witness by calling to his attention certain testimony given by him in the interference, but this attempt fails, and is merely an attempt to slur positive, clear testimony by mixing up slight dimensions of space and by splitting up moments of time, and only tends to strengthen the purport of the testimony, due to the rigid bearing up of the witness under such tactics.

It seems that after the reamer was quite extensively used through the different fields Wilcox heard Bole make a remark that Bole had devised the key, some time in the year 1912. This was doubtless due to Bole attempting to carefully lay a plan, which he did not bring to Wilson's ears of course, to subsequently mulct Wilson and his company of the amount

of his large indebtedness to this and then lay some claim, with all the strange animus of a debtor to injure his creditor, to being the inventor of this key because he had suggested prying it out, which never was a success but for which was substituted the wedging of the key up and the driving of it out [line 6, p. 242, to line 24, p. 264, transcript]. The succeeding testimony on the same page also shows that when Wilson and Bole and Willard turned away from the desk at the shop and Wilcox saw the sketch of the single-piece key and heard the statements of Wilson and Bole pertinent to prying out the key Bole did not have any sketch in his hand or hold it in any way so that he could see it.

Clearly, this was the time and this was the place and this was the manner at and in and by which Bole first heard of a single-piece key device for an under-reamer. He never had had anything to do with under-reamers except to sell a few on the account of Wilson, these reamers being made for Wilson by the Wilson & Willard Manufacturing Company. His attempt to intrude himself as a mere pryer-out of a reamer key and then claiming he was its inventor does not give him the shadow, even, of joint inventorship. A thing must first be invented, as Wilson invented this key, before it could ever be put into place or removed.

W. W. Wilson testifying, beginning on page 267, states that he first was connected with the Wilson & Willard Manufacturing Company in August, 1908, and that he became bookkeeper and in charge of the office

routine, and later on became superintendent of the shop, and in 1913 was made vice-president of the company. He states that work was first commenced on the first one of the Wilson under-reamers with the single-piece key shortly after the conference in the Wilson & Willard Manufacturing Company's shop at which the key was discussed, and that was in February, 1911 [lines 31-5, pp. 268-269, transcript]; that he fixes this time from an order which he has seen and also a letter received from Williams of the Pacific Iron Works in McKittrick which arrived on the 30th of January, the witness picking up Defendant's Exhibit Pacific Iron Works Letter of January 28, 1911; and that he saw that letter when it came in, E. C. Wilson showing it to him shortly after he opened it [lines 5-20, p. 269, transcript]; that the first time he heard about the single-piece key that is built into the Wilson under-reamers, or the first time he saw a key of this type or a sketch or any representation, was at the conference which he believes took place on the 2nd or 3rd of February, 1911, E. C. Wilson first mentioning the use of a single-piece key when he received the order for the old-style slotted tee-bar from Williams of McKittrick, the witness referring to Defendant's Exhibit 2 [lines 29-11, pp. 269-270, transcript]. He then goes on to state that on receipt of this letter from Williams of McKittrick the matter was taken up with the witness by his brother as to whether or not it was possible that the draughtsman who made up the drawings for the old two-piece key under-reamer made them as strong as they could be (pre-

sumably the parts as designed by the draughtsman); that he and his brother figured the matter out in connection with the under-reamers then in the shop and found that a much larger hole could be bored in the body which would make room for a large diameter tee-bar in which the slot would not weaken so seriously as did the old style two-piece or as did the slot in the tee-bar for the old-style two-piece slotted-tee reamer, or two-piece-key reamer; that they then went in on the draughting board that afternoon and figured out how big they could make these, and the witness figured up the area of the rod that they could put into the reamer, and, subtracting from this the area which would be taken out by the slot, he found that the remaining area was greater than the cross-section of area of the tee-bar then in use, so that they found they could place a tee-bar in that type with a form of ample strength; that E. C. Wilson then stated that that would be the reamer to make; and they both agreed that that was the reamer to make in the future, because the trouble with the old slotted tee under-reamer was the fact that the tee-bar broke, giving trouble; that the key matter was talked over *at that time,* but only indefinitely; that the witness. as he remembers it, asked Wilson whether or not he would use the same kind of key he used in the old reamer, and he said no, he was *going to get one up with a single-piece*, that he thought it would not give the trouble of wedging against the plug. That later on, the next day, he believes, or the day following that, his brother stated that he intended to write Williams and find out his opinion as to

whether a reamer using such a tee-bar and such a key would be easily assembled and disassembled and not give the trouble that had been occasioned by the sticking of the plugs in the block-and-screw type—if he did not think that would overcome the prejudice which drillers seemed to have against the Wilson reamer; that they found that drillers preferred the other type of under-reamer, although from their experience and their observations they believed that more breakages occurred with the Double under-reamer than with their under-reamer; that they could not understand this except from the fact that possibly the inconvenience of the plugs caused a prejudice on the part of the drillers or the men using those under-reamers; that this letter was written to Mr. Williams at McKittrick and on January 30 they received a reply from Williams [line 12, p. 270, to line 10, p. 273, transcript].

The witness then goes on to say that two or three days subsequent to that he was passing through the shop to the shipper's desk from the office to get some information in regard to a shipment of material received in the shop, and he believes he stopped and talked with Knapp a few moments about some matter; that then it came to his attention that Willard and Bole and E. C. Wilson and Wilcox were standing near one of the shapers, near the back shaper in the shop, looking at an under-reamer which was lying on the floor, and so he stepped up to the conference and saw there his brother had a sketch on a piece of paper, or several sketches on two or three pieces of paper, showing different types of keys, and explaining that

he did not want to use the old two-piece key but that he had gotten up several different designs of key that could be used in this reamer, one of them being retained by a single plug and another by a countersunk-type plug similar to that used on the old two-piece key under-reamer, and another consisted of a plain bar of iron with a bevel at one end, with a plug at each end of the key to hold it in place, and another of a bar of iron or straight piece of iron with one end beveled and the wings projecting down; that these were hooks with a vertical side and an inclined side to them; that Wilson said that this one could get into the reamer but he didn't see exactly how to get it out, and Bole stated, "pry it out," and he believes Wilcox added, "Yes, pry it out," and that the general concurrence of opinion at that time was agreed on that it could be pried out of the reamer. He then goes on to state that the topic of conversation then took the form of a discussion of the methods of prying it out, and he then stepped over to the shipping desk and got his information and, he believes, returned back to the office. The witness goes on to further state that subsequent to this time an order was gotten out which he saw at the time in the shop to change over an old under-reamer they had there and put in the new type of key and also the enlarged tee-bar as they had figured out; that the work was begun on that order, and that that reamer was finished up in the shop in this manner and was later on sold to Norbeck & Nicholson Company and shipped to Dakota, and they never heard any objection to the under-reamer, or heard of it, particularly,

since, and that it was paid for by the Norbeck & Nicholson Company. That Bole was the first one that said, "Pry it out," and he is sure Wilcox was present at the time, and that this discussion about prying out the single-piece key took place in the shop of the Wilson & Willard Manufacturing Company within eight or ten feet of the shaper furthest from the office in the shop, there being a shipping desk at that end of the shop, and the conference or talk was about eight or ten feet from the shipping desk, and that he has not seen the sketch or sketches which his brother had at that time since the occurrence. He then identifies the reproduction sketch made by him in the interference suit and which he states, as he remembers, is the key that Mr. E. C. Wilson was explaining—the key sketch that Mr. Wilson was explaining at this conference of February 2, or 3rd, 1911, this sketch being in evidence as Defendant's Exhibit W. W. Wilson Key Reproduction Sketch. He identifies order 6904 for changing over the under-reamer shortly after this conference, and other parts of Defendant's Exhibits 6, 7 and 8. At this point complainants admit that they do not controvert the question of time of a slip of the order referred to [line 10, p. 273, to line 13, p. 278, transcript]. The witness then goes on to testify as to the carrying out of the work in the shop pursuant to order 6904 and the associated order 7056, it being admitted by complainants that Knapp was foreman of the shop and had charge of the work. The witness testifies on examination by the court that his brother gave all the orders with regard to the construction of

this reamer [lines 30-32, p. 279, transcript] and that he saw that reamer assembled, with the key in place, and that he saw the reamer disassembled and the key removed after the parts had first been put together, further corroborating the testimony of Wilson, Knapp and Houriet as to Houriet first driving the tang of a file under one edge of the key and prying it up, and Houriet was then able to drive the key out on the other side. He also distinguishes between this key and the lever of the Defendant's Exhibit 9 [line 14, p. 278, to line 31, p. 280, transcript]. The witness also further testifies as to this. This witness is not weakened on cross-examination, and certainly his testimony establishes the fact that Wilson devised this single-piece key in the last week of January, 1911, made sketches of it shortly afterward, and shortly afterward disclosed it, to Wilcox and to Bole and himself at least, at the rear of the shop of the Wilson & Willard Manufacturing Company, and that reamer 120 was immediately thereafterwards put into process of production and completion, or making over, and when completed was shipped to the Norbeck & Nicholson Company. The proofs are full and complete as to conception, disclosure and sketches and immediate diligence on behalf of Wilson in respect to this invention, and there is no scrap of evidence to show that Bole had anything to do with it except to suggest that the key be pried out, which was a method of removing the key which was not followed, but, rather, the method devised by Houriet.

### Court's Instructions Against Evidence.

It is to be pointed out here that the court, as shown in lines 20-13, inclusive, pp. 290-291, barred proofs which appellants contend would be proper as to this important question of priority and originality as between Wilson and Bole.

### Reproduction Sketches of Wilson Single-Key Sketch of Conference About February 1, 1911.

In addition to the Defendant's Exhibit Charles E. Wilcox Key Reproduction Sketch, there is Defendant's Exhibit W. W. Wilson Key Reproduction Sketch, both of which show the single-piece key of the issue, and reflect what these witnesses say the defendant Wilson had in sketch form and disclosed to them and to Bole at this conference. This all is the unequivocal, positive and confirmatory evidence of Wilson's disclosure. And it will be remembered that there was a Wilson reamer present and that all these parties were thoroughly conversant with the Wilson reamer, making the disclosure full and complete, and this is the first believable testimony we have as to any disclosure of this invention by either Bole or Wilson to anybody else. This is true, among other reasons, because the testimony rings true, and furthermore because Wilson followed up this disclosure with industry and diligence in and about reduction to practice—something that Bole never did at any time.

The foregoing analysis of the record in this case

must make it exceedingly plain that the Bole patent is absolutely void because of anticipation by the Wilson admitted diligence, manufacture, sale, and use, together with the extensive circularization of the trade as to the same, many months before Bole filed his application for the patent in suit, and going back in fact to a time substantially twenty-two months before Bole applied for such patent.

Bole Patent Admittedly Invalid for Anticipation Unless Bole be Found to Have Proven He Disclosed the Invention to Wilson Prior to January 26, 1911.

*On this score there can be no doubt under the law, for the making and selling of a single specimen, or knowledge of another of a single specimen, of a patented thing, prior to the date of the patent, if such making and selling was performed by any other than the inventor, or the knowledge came not from the inventor, will absolutely defeat the patent date unless the patentee can show an earlier date of invention. If it be assumed that Bole was in possession of the invention in September, 1908, unless he prove that he disclosed it to Wilson before Wilson came into possession of the invention, Bole's asserted rights must absolutely fail for want of diligence, no explanation being given why he never reduced the invention to practice or had it reduced on his behalf, or applied for a patent, until February, 1913. By all equity, requiring him to speak out and assert his right if he had the invention—and which he did not do during all that long period of time*

*he witnessed Wilson's right to the invention and to the practice of it—Bole is barred from claiming any right of the patent in issue.*

*So Bole must prove that he had the invention before Wilson did and that he disclosed it to Wilson, in order to win in this suit. Coming right down to the specific issue, we wish to present on the record, Bole must prove that he disclosed this invention to Wilson before January 26th, 1911, in order to prevail on this appeal. Even then, it is a question whether his patent can be found valid, due to his laches and his failure to assert his rights and file an application until he had permitted Wilson to incorporate in the good will of his business his (Wilson's) assertion of his right to this invention.*

*As a matter of fact, we contend that Bole never had the invention prior to the time it came into the possession of Wilson through his own conception thereof, but that, on the contrary, Wilson, being the originator of the invention, disclosed the invention to Bole on or about the 3rd of February, 1911, and Bole never did anything in and about the invention other than to make certain useless explanations about prying out the key, and then surreptitiously applied for a patent some two years after.*

*So we contend that Wilson must prevail in any event, because,*

*First. That the activity of himself and the defendant corporation in practicing the invention absolutely invalidates the Bole patent in suit in anticipation.*

*Second. That Bole, even if in possession of the invention before Wilson was, never disclosed the inven-*

*tion to Wilson, and that, therefore, Wilson was an independent and original inventor.*

*Third. That Wilson, so being an independent and original inventor, disclosed the invention to Bole and gave him all the information about the invention which he utilized in applying for the patent in suit for the invention; Bole never theretofore having any knowledge whatsoever of the invention or in any manner being in possession thereof; that if Bole was in possession of the invention before Wilson, he never disclosed the same to Wilson, and is not a prior inventor because he lost his rights through laches and want of diligence to reduce his invention to practice and even to apply for a patent until his rights were barred by the diligence of the independent and original inventor Wilson, who, upon all of the rules and authorities, must be found the prior inventor, as well as the original inventor, of the issue of the patent in suit.*

*Therefore, we repeat, that unless Bole has proven in this case that he disclosed the invention to Wilson before January 26th, 1911, or before the conference of about February 3, 1911, defendants in any event must prevail on this appeal.*

*And there is not one faint color of any evidence in this case other than the unsupported and contradicted word of Bole to tend to prove that Bole did so disclose the invention to Wilson.*

And can this unsupported assertion of a discredited, animus-actuated man, who mulcted the plaintiffs out of substantially $5,000 in a settlement, and flew to Wilson's competitor, prevail as against the proofs

and admissions of this case in anticipation of the Bole patent by Wilson's activity, Wilson's disclosure to Bole, and Wilson's independent procedure and diligent activity in and about the invention?

Whatever singular and improperly presented fragmentary doings there were back in 1908 at Maricopa, they produce no controlling presumption as to what Bole did in the shop of the Wilson & Willard Manufacturing Company in 1911. The appellee Bole, who was trapped in his deceitful attempt to make out the case of the production of an earlier reamer for the single-piece key than the reamer number 120, is not to be believed when he tells us that he told Wilson about this invention, and when Wilson denies it, and when he fails to even attempt the corroboration through Naphas, which he said was possible, and when this same conspirator appellee is denied and unsupported as to his assertions, not only by Wilson, but by Fahnestock and Grigsby, and Bole's friend Willard, and whose own witness Naphas has shown, by words out of his own mouth, to have been absolutely in error as to the things he testified about, because of his specific false fixing of the time in evidence.

Of course, Bole denies the disclosure by Wilson to him at the February conference, and denies the waiver of any claim to the invention and covenant not to injure Wilson in and about the invention in February, 1913. This is to be expected.

*Bole is estopped by his covenant of February 1, 1913, in the settlement with the appellant corporation, in which he agreed in fact never to assert any claim as to*

*the invention or make any trouble about it for the appellants. This was a covenant for the benefit of the Wilson corporation, as the appellant corporation was making these reamers for Wilson and entered into the terms of the settlement. Bole got his cheap settlement for one reason, because of this covenant, even if it entered only minutely into consideration, in passing from Bole to the appellant corporation. This was no recognition by Wilson of Bole's claim, but is a covenant by Bole to withdraw the claim and never to again assert it and never, under any circumstances, to harm this appellant corporation by such claim or by anything growing out of such claim. So, if the discredited Bole is faintly or in any measure believed as to his disclosure of his invention to Wilson, he is estopped and barred by all equity and good conscience from asserting any claim to said invention, and, of course, the claim of the other appellee, Double, his co-conspirator in this attack upon the appellants' claim, must likewise fail. We, therefore, in this case have the slender foundation for the appellees' claims comprising an unsignifying postal card of 1908, and the unsupported word of a discredited party to the suit, into which eats the corrosion of this estoppel with respect to the appellees asserting any claim in and about this invention as against the appellants.*

### Enigma of the Trial Judge's Findings.

How, with these facts before the trial judge, he could reach the remarkable conclusions of the opinion verbally rendered will, it is believed, be a matter of extreme con-

jecture on the part of this court; how the trial judge could excuse Bole from perjury, because he did not appear to be perjuring himself in a more extensive or conventional manner; how such element of perjury, if it entered into the case, was not controlling on the case; how Wilson could be found wanting in diligence equally with Bole when Wilson was vigorously asserting his invention and flooding the oil well fields with reductions to practice thereof, while Bole was running up a debt to Wilson and never asserting any claim to the invention; and how he could find that Bole had no opportunity to apply for a patent unless the appellants should try out the invention when the appellants showed their eagerness to adopt the invention as soon as Wilson originated it, and would doubtless gladly have paid Bole a royalty for this invention or bought the invention outright, if Bole had produced it, and been a man of honor enough to have treated with his friends rather than with his friends' enemies; how the court could have put any faith in the January 17, 1913, letter of Bole asserting, for the first time, to Wilson, Bole's claim in and about the invention, after Wilson had been practicing the invention for nearly two years, and in view of the fact that Bole was desperately in debt to Wilson's company; how the trial judge could find that it was a very unnatural and unusual thing to make a settlement with Bole without including in that settlement the controversy concerning the key, when Wilson attempted to explain to the court his procedure in these respects, and the court cut him off with the ruling that such statement of the reasons for that settlement was

immaterial;—how, in fact, there could be found to be anything sacred and holy about the patent in suit because it had been issued by a tribunal operating in total ignorance of the equities against the patentee and in favor of Wilson, when the patent was issued, and which tribunal, the Patent Office, upon becoming cognizant of Wilson's side of the story, has twice decided in favor of Wilson as to priority and originality of invention—all these things are beyond understanding; and, out of our high respect for the trial judge, we have only to say that the findings of the lower court reflect a confusion incidental to the first trial by a judge of a patent suit and which this Honorable Appellate Court is solicited to resolve into order and legal correctness. A review of the overwhelmingly controlling law on the facts supporting appellants' contentions will now be presented.

**Authorities and Conclusions.**

As to anticipation being a controlling defense in this case by proving want of novelty in Bole, the invention, having been practiced by Wilson prior to the date of Bole's application, Sec. 4920 of the Revised Statutes is warrant, without further showing to this court. Sec. 4886 permits the actual inventor to use the invention up to two years prior to the time of his applying for a patent; but the making of a single specimen of the thing patented by another prior to the date of application for patent, unless the patentee has disclosed his invention to such other, operates to negative novelty, as see Walker on Patents, Sec. 72, page 67.

Sec. 4920 likewise provides for the interposition of other defenses relied upon, namely, that Bole was not the original and first inventor or discoverer of any material or substantial part of the thing patented, and further, that he surreptitiously and unjustly obtained the patent for that which was in fact invented by another, Wilson, who was using reasonable diligence in adapting and perfecting the same, and who applied for letters patent for the invention in evidence twenty-seven days after Bole filed his application, and well within the two years permitted to Wilson by statute to practice his invention prior to such filing. The application is only constructive reduction to practice, and this is all that Bole has in the case. Wilson has behind him the actual reduction to practice indulged in for nearly two years before the constructive reduction to practice by Wilson consisting in filing his application involved in the pending interference in the Patent Office with the Bole patent in suit.

The present suit is brought under Sec. 4921 of the Revised Statutes, involving the patent issued to Double and Bole on an application filed by Bole, and which patent, as above pointed out, has twice been found by the Patent Office to cover an invention originally and independently and first produced by Wilson, the appellant. These applications are found to have been copending eight months, and, therefore, any interference should have been declared as between the Bole and Wilson applications before the issuance of the Bole patent, under Sec. 4904 of the Revised Statutes. Had such

interference been declared while the applications were co-pending the patent of Bole would never have issued, as yet at least, inasmuch as the Patent Office has twice found Wilson to be the inventor, and not Bole. It was through inadvertence or carelessness of the Patent Office that there was not timely declaration of such interference and that the Bole patent was permitted to issue, so that the interference had to be declared between the issued Bole patent and the still pending Wilson application, allowing this unwarranted monopoly to issue forth in favor of Bole from the portals of the Patent Office for the persecution of Wilson and his company, as put into effect by the filing of the present suit and the damaging assertions in the field and trade made possible by the wrong issuance of such patent to Bole, and to the effect that Bole, and not Wilson, was the inventor of that asset of Wilson's business, a factor of Wilson's good will, consisting of the invention in issue.

### Burdens Which May be Imposed Upon Wilson Due to the Careless and Inadvertent Action of the Patent Office.

If a patent should issue to Wilson pursuant to the deliberations of the several tribunals of the Patent Office which hear interference contests, a further proceeding may be necessary to be established in the Federal Court under Sec. 4918 for cancellation of one, either the Bole or the Wilson, patent. Furthermore, if a patent is refused to Wilson, he may bring an action in the Federal Court under Sec. 4915, Revised

Statutes, to authorize the issuance of a patent to Wilson. It will be seen that this suit is within the jurisdiction of this court with respect to infringement of the patent issued to Bole, in a forum of the same order and class as the Patent Office, and the Appellate Court above it, on the questions of priority and originality of invention at least, the jurisdiction of this court on the question of cancellation of one of two interfering patents, on the question of authorizing the issuance of a patent to an unsuccessful inventor, being grounded in sections of the statute of no higher order or greater scope and authority than sections which provide for the determination of interference contests in the Patent Office. And the jurisdiction of this court in this suit is under a section of the statutes of similar order, as well as are the defenses of this suit presented under a section of similar order, all of such five sections of the statutes being closely grouped together and necessarily interrelated for purposes of providing for justice in determining issues of infringement and issues of priority and originality of invention as between inventors, *and particularly as between inventors which are parties to the same litigation.* It is only natural, therefore, and to be expected, that the Patent Office tribunals are to receive close attention by the Federal Courts as to their findings on questions of fact. That their findings are so highly persuasive upon this court in an action pertinent to the right to patent on originality or priority of invention was early settled, and this doctrine has persisted ever since and is a doctrine apparently totally ignored by the trial court in this case. And at

this point we wish to assert that appellants laboriously and diligently and exhaustively set forth, and offered further to set forth, the law in this and other leading respects upon the trial of this case, in order that the trial judge might, in this, his first patent suit, have our respectful offer of assistance to familiarize himself with what we believe he admitted was, to him, a radically new department of jurisprudence.

This viewpoint as to accrediting the tribunals of the Patent Office forum and the appellate federal tribunal next above the same, namely, the Court of Appeal of the District of Columbia, upon the findings of fact pertinent to originality and novelty and priority of invention arrived at in such federal forum, inclusive of the Patent Office and such appellate tribunal above the same, and which has crystallized and become consolidated into a strong and far-reaching doctrine, is based upon good sense and reason, inasmuch as this Patent Office forum is specially organized and expertly organized for the considering and the ruling upon contests of this order, whereas the various Federal Courts of the nine circuits are not in any manner or any instance so peculiarly specialized and equipped unless we find such equipment and specialization reflected in the learning and ability of a judge who, as a matter of accident, is particularly versed in the law of patents and the laws of mechanics, and brings to the performance of his judicial functions qualifications in these respects which apparently are not deemed of any controlling value determining the selection of federal judges. In other words, a judge who pre-eminently

must pass upon the vast amount of litigation involving the United States of America as a party, and involving bankrupts and violators of the law, criminally and civilly, in many diversified branches of the practice in the Federal Courts, cannot be presumed in any instance to be chosen to fill his office because he is a good patent judge before taking office. Therefore, the Patent Office should be given a widely open ear by the Federal Courts as to its pronouncements on these questions of fact pertinent to priority and originality of invention as between contesting claimants.

This doctrine under discussion was early announced in Shuter *et al.* v. Davis *et al.,* 16 F. R. 564, in which it was said:

> "The defense that Mark Davis was the original and first and original inventor of the patent improvement, that complainants obtained the patent in fraud of his rights, supported by some impressive probabilities on the testimony of several witnesses, is met by strong opposing proofs on the part of the complainants. Under the circumstances the presumption arising from the grant of the patent to the complainants is not sufficiently overthrown, and must prevail. But it also appears that the defendants were parties in a suit to interference proceedings before the Patent Office between the complainants and Mark Davis; that proceeding having been set on foot by Mark Davis for the benefit of the defendants to protect them from the complainants' patent, and under the agreement between him and the defendants, by which the defendants undertook to pay, and pursuant to which did pay, the expenses of the pro-

ceeding. The question of priority having been determined in favor of the complainant in that proceeding, it is *res adjudicata* as between the parties to it."

See:

Handfort v. Westcott, 16 O. G. 1181 (Official Gazette of Patent Office);
Greenwood v. Brocker, 170 F. R. 857;
Beck v. Lindsey, 2 F. R. 688;
Holliday v. Pickhart, 12 F. R. 147.

This extreme view has become somewhat modified, and, while the decisions of the Patent Office on questions of originality and priority are not now held by the authorities to make the matters in controversy *res adjudicata,* nevertheless, they go so far as to say that such decisions are to be followed, *unless convincing proof to the contrary is adduced.* This puts the burden of proof upon the complainants in the case at bar.

Walker on Patents, the leading textbook authority on the subject of patent law, quoting from Sec. 142, page 128, says:

"No decision of the Commissioner of Patents or the Court of Appeals of the District of Columbia, in any interference case, is pleadable as *res adjudicata* in any action in any court; but such a decision will be followed by all the courts, unless it is shown to be wrong by evidence which puts the point beyond a reasonable doubt. * * * If, in such a case as that under present consideration, it had happened that the successful applicant had filed his application before the interfering

> patent was granted, that patent would not have been granted at all unless the Patent Office decision on interference had been reversed by some higher authority. In that event, the successful applicant would not have been liable to any interference suit, nor any infringement suit brought against him by his rival; for his rival would in that event have no patent upon which to base a suit of either of those kinds."

The Patent Office interference proceeding has been decided on behalf of Wilson, and he *did* file before the Bole patent was erroneously granted, and some eight months before that time, which has, as above pointed out, shown that the Bole patent in suit should never have been issued at all. Had this interference proceeding been decided as it should have been prior to the issuance of a patent to Bole, such patent would not have been issued at all unless the decision had been reversed, and this suit could not yet have been brought. The high importance of the action and power of the Patent Office with respect to the determination of questions of interference is thus seen. As the matter now stands, Wilson has been subjected to many thousands of dollars of expense in and about this issue of invention and infringement, absolutely unwarranted by a full observance of the statutes and authorities. Not only was the Patent Office derelict in the performance of its duty for many months as to the declaration of interference between Bole and Wilson, but when that forum had found in favor of Wilson, the trial judge in this case refused to follow its findings, and, upon a record remarkably devoid of any corroborative or

convincing proof, added to Wilson's woes and financial burdens by in effect reversing the findings of the Patent Office and necessitating the heavy expense and labor of this appeal. As the matter now stands, unless the decision of the Board of Examiners in Chief in the Patent Office is reversed, the patent will be issued to the defendant Wilson covering the same invention as that of the complainant Bole, and Wilson may bring his proceeding under Sec. 4918 in the lower court to cancel the patent to Bole. If, on the other hand, the decision of the Patent Office is reversed and Wilson does not prevail on appeal, he may have his remedy by a bill of equity in that court under Sec. 4915 for decree that Wilson is entitled to receive the patent for his invention and authorizing the Commissioner of Patents to issue such patent. So closely, as previously pointed out, are the functions of this court interrelated with the functions of the Patent Office, under Secs. 4921, 4918, 4915, 4904 and 4920, that it is impossible for a court such as this to pass properly upon the validity of letters patent where the question of originality or priority of invention is concerned, without taking notice of, and giving an open ear to, the deliberations and findings of the Patent Office under Sec. 4904. To fail so to do is to plunge a contestant on the question of priority or originality of invention into a multiplicity of contests and appeals therefrom, in concurrent jurisdictions, which can lead to only one ultimate and final solution, namely, an appeal to the Supreme Court of the United States, to straighten out such tangle as between such jurisdictions, which, instead of mutually

working to a common end, are, in this case, operating in conflict each with the other to the prejudice, peril, expense and bewilderment of the appellant Wilson. The record of this case in the lower court shows that it was solicited to stay the proceedings in this suit pending the determination of said interference in the Patent Office, but that even such motion was denied, and the appellants were forced to go to trial on an issue which, under the authorities, was most properly to be decided by the Patent Office, and which was so decided in favor of Wilson a few days before such trial began.

Further on this doctrine of Patent Office recognition on this matter of originality and priority of invention, let us turn to another text writer, Robinson on Patents, who more emphatically pronounces this rule in Sec. 1024, pages 255-257:

> "Where this question of priority of invention has already been decided in an interference proceeding, the record of that judgment is admissible in favor of the then successful party, and, even though not conclusive on the jury, is entitled to grave consideration."

It will be seen from this that the record of a judgment of the Patent Office under the Bole interference proceeding was properly admissible in this proceeding in favor of the successful party Wilson; and as to this Walker, *supra,* says, in the second paragraph of Sec. 318, page 282:

> "A properly authenticated copy of a decision of the Commissioner of Patents in such an inter-

> ference, or of the Court of Appeals of the District of Columbia, reviewing such a decision of the commissioner, is admissible in evidence in an interference suit between patents on inventions which were involved in such an interference."

Because of the authorities, the introduction in this case of a certified copy of the decision of the lower tribunal in the Patent Office, which is, until reversed, the finding of the Patent Office in this controversy on priority irrespective of the pendency of any appeal, is, as to one of the defenses in this case, properly admissible in evidence, as is likewise, as a corollary proposition, a certified copy of the opinion of the Board of Examiners in Chief in the Patent Office, affirming strongly the opinion of the Examiner of Interference in the Patent Office, and which is respectfully offered for the consideration of this court on the argument of this appeal. And likewise, as a corollary proposition, we offered a certified copy of the Wilson application involved in the interference, decided in favor of Wilson, as admissible in evidence in this case with the other paper pertinent to the pendency of the interference. It is part of our defense that Wilson was the prior inventor as well as the original inventor, and, in order to make him out as such, his diligence will be shown as material, in contrasting the same with the lack of diligence of Bole in connection with the hypothesis that he was an independent and prior inventor; and, therefore, the applications lodged in the Patent Office by these parties and the dates and data pertaining to such lodgments are further material to the determination of this controversy.

A leading case on this doctrine of the influence of the decisions of the tribunals of the Patent Office upon the courts with respect to a controversy involving priority of invention (and priority must always include originality, for lack of originality will, of course, defeat a claim of priority, although the element of originality is not always specifically within the controversy), is that of Morgan v. Daniels, 153 U. S. 120. In that case, decided by the Supreme Court of the United States April 23, 1894, the Supreme Court supported the findings of the Examiner of Interferences in the Patent Office after three reversals, and the syllabus states:

> "When a question between contending parties as to priority of invention is decided in the Patent Office, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction."

Further excerpts from this decision are as follows:

> "What, then, is the rule which should control the court in the determination of this case? * * * The plaintiff in this case, like the defendant in those cases, is challenging the priority awarded by the Patent Office, and should, we think, be held to as strict proof. In the opinion of the court below the rule is stated in these words: 'The complainant, on the issue here tendered, assumes the burden of proof, and must, I think, as the evidence stands, maintain, by clear and undoubted preponderance of proof, that he is the sole author of

that drawing.' 42 Fed. Rep. 451. * * * The case as presented to the Circuit Court (under Sec. 4915) was not that of a mere appeal from a decision of the Patent Office, nor subject to the rule which controls a chancellor in examining a report of a master or an appellate court in reviewing findings of fact made by the trial court. There is always a presumption in favor of that which has once been decided, and that presumption is often relied upon to justify an appellate court in sustaining the decision below. Thus, in Crawford v. Neal, 144 U. S. 585, 596, 12 Sup. Ct. 759, it was said: 'The cause was referred to a master to take testimony therein, "and to report to this court his findings of fact and his conclusions of law thereon." This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and, unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in consideration of the evidence, the decree should be permitted to stand.' * * * *But, this is something more than a mere appeal. It is an application to the court to set aside the action of one of the executive departments of the government. The one charged with the administration of the patent system has finished its investigations and made its determination with respect to the question of priority of invention. That determination gave to the defendant the exclusive rights of a patentee. A new proceeding is instituted in the courts—a proceeding to set aside the conclusions reached by the administrative department, and to give to the plaintiff the rights there awarded to the defendant. It is something in the nature of a suit*

*to set aside a judgment, and as such is not to be sustained by a mere preponderance of evidence. Butler v. Shaw, 21 Fed. Rep. 321, 327. It is a controversy between two individuals over a question of fact which has once been settled by a special tribunal, entrusted with full power in the premises. As such it might be well argued, were it not for the terms of this statute, that the decision of the Patent Office was a finality upon every matter of fact. In Johnson v. Towsley, 13 Wall. 72, 86, a case involving a contest between two claimants for land patented by the United States to one of them, it was said: 'It is fully conceded that when those officers (the local land officers) decide controverted questions of fact, in the absence of fraud, or imposition, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department.'*

*"Upon principle and authority, therefore, it must be laid down as a rule that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction. * * * The question of priority is doubtful, and, if doubtful, the decision of the Patent Office must control. * * **

*"It is enough to say that the testimony as a whole is not of a character or sufficient to produce a clear conviction that the Patent Office made a mistake in awarding priority of invention to the defendant; and because of that fact, and because of the rule that controls suits of this kind in the courts, we reverse the judgment. * * * ."*

*Here, as in the present case, the defendant had been awarded priority of invention, and the findings of the Patent Office on priority of invention were followed by the court in its instructions to dismiss the bill, and, as we see, the findings of the Patent Office were held to be the findings of a special tribunal intrusted with full power in the premises, as under Sec. 4904, and whose findings might well be argued to be a finality upon every matter of fact were it not for the special provisions of the statute (as under Secs. 4915, 4918 and 4921).*

This decision has been cited and followed very frequently and is believed still to state the law as propounded by Mr. Justice Brewer of the Supreme Court in 1894. A number of such later authorities will now be adverted to, these authorities bringing the ruling up into close coincidence with the decision above referred to in the early case of Shuter v. Davis, 16 Fed. Rep. 564.

In Standard Cartridge Company v. Peters Cartridge Company, 77 F. R. 630, decided in 1896, the first syllabus is as follows:

> "In proceedings, under Revised Statutes, Sec. 4915, by a defeated contestant in interference proceedings to establish a right to a patent, the decision of the Patent Office upon the question of priority, is to be taken as presumptively correct, and the burden is on the complainant to establish his case by testimony of a character which carries thorough conviction."

69 Fed. Rep. 408, affirmed.

The opinion, delivered by Judge Lurton, later of the Supreme Court, commences as follows:

> "Though the issue is one of priority of invention between Charles Hisey and George Ligowsky, its solution under this proceeding does not depend upon the mere preponderance of evidence. That department of government charged with the duty of originally hearing and determining questions of priority arising under conflicting applications of inventors has, upon evidence and full consideration, determined the controversy between those parties against the contention of the present complainants, and awarded a patent to the assignee of George Ligowsky. But for the provision made by congress, and found in section 4915 of the Revised Statutes, the conclusion of the executive department of government that Hisey was not entitled to a patent upon improvements which he claims to have invented in cartridge loading machines, would be fatal to his claim."

See also first and third paragraphs, page 636, in which it is seen that new evidence, cumulative in nature, was added to the trial of the case, over and beyond the record upon which the Patent Office decision is based, similar to the situation here.

See also end of last paragraph, page 655:

> "On the whole case, however, we lean to the correctness of the judgment of the Circuit Court and the action of the Patent Office."

See also Thomas & Sons v. Electric Porcelain & Manufacturing Company et al., 111 Fed. Rep. 923, first syllabus and second and third paragraphs, page 929,

in particular, the ruling in Morgan v. Daniels being again reasserted and relied upon.

See also the leading case of Ecaubert v. Appleton *et al.*, 67 Fed. Rep. 917, first syllabus and last paragraph, page 919, first and last paragraphs, page 921 *et seq.*

See also Greenwood *et al.* v. Dover *et al.*, 194 F. R. 91, first syllabus, and on page 91 as to appeals from the Patent Office in interference in questions, first paragraph on page 95 referring to conclusion in Morgan v. Daniels, second paragraph, page 95, as to additional evidence, last paragraph on page 94, particularly, showing the weight of the decisions of the Patent Office and the rank thereof, and the procedure therein, in interference matters, and the third paragraph on page 97 as to the burden upon the losing party in any interference proceeding.

See also Computing Scale Company v. Standard Scale Company, Limited, 195 F. R. 509, decided April 2, 1912, particularly the last paragraph on page 915, showing that an interference award deciding priority should be adopted by the courts as to litigation by the same parties unless there is thorough conviction to the contrary, reaffirming the doctrine of Morgan v. Daniels.

See also Hilliard v. Remington Typewriter Co., 186 F. R. 344, decided 1911, first syllabus showing that the burden of proof is on the complainant to prove the Patent Office decision on priority is wrong.

See also page 336, last paragraph, in which the doctrine of Morgan v. Daniels is once more pronounced, and also see Wire Book Sewing Machine Co. v. Stevenson, 11 F. R. 155, with respect to the burden of proof of priority; Lang v. Twitchell-Champlin Co., 207 Fed. Rep. 363; Novelty Dredge Manufacturing Co. v. Brookfield *et al.*, 170 F. R., 946, 955, 38 App. D. C. 528, 34 App. D. C. 491, 177 F. R. 224, 33 App. D. C. 4341, 34 App. D. C. 450, 36 App. D. C. 116, 31 App. D. C. 302, and 33 App. D. C. 490.

We also find the doctrine of Morgan v. Daniels announced again by the Circuit Court of Appeals in the second circuit, on a decision rendered February, 1909, *in re* Roth *et al.* v. Harris, 168 F. R. 279. In this case, referring particularly to the last three paragraphs on page 285, additional testimony was taken in the court, but in a suit for infringement of patent involving interference, the court applied the doctrine of Morgan v. Daniels, stating that the case was correctly decided on the interference proceedings and the result would have been the same if the additional testimony found in the record of the suit had been included in the record of the Patent Office.

In this case we wish to point out that the record in the interference proceedings as between the parties to this litigation, involving the invention in issue, was fully twice as ample as the record before the trial judge.

We submit that the authorities and text writers make it plain that not only is the decision of the Patent Office, which has been rendered on behalf of Wilson

in the interference proceedings between Bole and Wilson, and affirmed on appeal, to be considered by this court seriously and with open ear, but unless it should be found that the complainants have not made out a case in this court, which clearly proves the findings of the Patent Office in such decision on priority to be wrong, such Patent Office decision must prevail in this case on our defense under section 4920 and Bole be found not to be the original or prior inventor. How a postal card and the unsupported testimony of the party Bole, in the very face of the estoppel operating against Bole, above referred to, can make out a case seriously to be considered as against the findings of the Patent Office, twice rendered, within a fair application of the doctrine of Morgan v. Daniels, is beyond our comprehension. Furthermore, Bole must be found to have surreptitiously or unjustly obtained the patent for that which was never invented by him, but was in fact invented by another, Wilson, who was using reasonable diligence in perfecting and adapting the same. This is all that section 4920 requires.

We have shown that Wilson's diligence was unusual. His reduction to practice commenced within a few days, or within a few hours, of his first proven knowledge of the invention, which was predicated upon his own conception. It is to be understood that the Patent Office not only finds Wilson to be the prior inventor, but the original inventor. That was necessary, because of the allegations of both parties to the interference proceeding, with respect to their disclosures of the invention, each to the other. Upon the theory that each in-

dependently produced the invention, so that the question of priority is raised, with the factor of originality conceded for the purpose of presenting a controversy, Bole must be found to lose, as has been decided by the Patent Office, inasmuch as his slightly earlier application will not avail him, because of his lack of diligence, even assuming that he independently produced the invention way back in 1908, as he testifies. Admittedly, he did nothing with the invention from the time of his alleged conception until the filing of the application in 1913, whereas Wilson conceived the invention and entered the field with it in 1911, immediately reducing it to practice, followed by putting it upon the market, and with a disclosure of the invention, with sketches, to others, and Wilson was filling the demand of the market for the invention continuously and uninterruptedly right up to the time he filed his application, twenty-seven days after Bole, and since that time. Bole, on this side of the case, dealing strictly with priority, is to be given but little consideration. Bole cannot prevail under the law as unequivocally pronounced in all the leading decisions.

See section 1024, Robinson on Patents, page 255, volume 3; see Automatic Weighing Machine Co. v. Pneumatic Scale Corp., Ltd., 156 F. R. 288, and particularly the seventh paragraph on page 294 and pages 295 and 296, as to what constitutes a completed invention, the first inventor being he who has put the invention into practice and he only being entitled to a patent. This Bole did not do in any sense. Continuing on pages 296, 297, 298 and 299, it is found that it is an

established rule that drawings in themselves do not constitute an invention, and, unless they are followed up by reasonable observation of the requirements of the patent laws, they cannot have any effect upon a subsequently granted patent to another. See particularly paragraphs 2 and 4 on page 299, in which it is held that it would be a perversion of the purpose of the patent laws if one who had conceived of a new device and proceeded as far as to embody it in sketches, or even in finished drawings, should there stop, and yet hold the field of invention against all comers for a period of years. Many cases are cited, and it is laid down in the second paragraph, page 300, that in a race between two independent inventors, he who first reduces his invention to fixed and positive form would seem to be entitled to the priority and right to a patent therefor. Bole never practiced the invention at all. See particularly the first paragraph on page 301, in which the rule of diligence is stated. The testimony in the case shows that Bole received the knowledge of his invention from Wilson, and afterwards surreptitiously or unjustly obtained his patent, unless the court believes Heber and Adams, and considers the inadmissible, doubtful deposition of Heber. See page 302 as to this. In the present case, of course, we have derivation by Bole from Wilson, and Bole cannot have a valid patent, Wilson being the original inventor, as found by the Patent Office.

On this question of originality, Loom Co. v. Higgins, 105 U. S. 580, 594, was a case in which one party was found to have derived the invention from another.

There it is shown that, as in this case, the party charged with derivation did not claim aloud that the invention belonged to himself. This is shown from the testimony of W. W. Wilson, E. C. Wilson and Wilcox, in respect to the disclosure by Wilson to Bole. *Why didn't Bole then and there assert that the invention under consideration was his at this conference of about February 3, 1911, which was too fully established in fact to be less than authentic history; why, if Bole was the inventor of the key issue, did he not at that conference assert such inventorship, rather than merely discuss a useless method of attempting to remove the key from the reamer?*

The Patent Office did not find proper diligence to have been used in Automatic Weighing Machine Co. v. Pneumatic Scale Corporation, Ltd., *supra,* and the court agreed with the conclusions of the Patent Office in this respect. This case goes very fully into the doctrine of diligence and cites a great many authorities. It may be stated to clearly define the law in these particulars, and is a late case, 1909. Further, on this question of diligence, see the following decisions, all announcing the rule above set forth. namely, that where there is a question of priority arising as between two or more inventors, he who is not diligent must lose out in favor of him who takes the field and is diligent, that being strikingly necessary in the present set of circumstances, where Wilson was asserting his claim to the invention and practicing the invention in the very presence of the other party, Bole, while Bole slept at the switch as to any claim he may have had

or thought he had as to this invention. See Grabowsky v. Gallaher, 191 O. G. 835; Watson v. Thomas, 108 O. G., 1590; Henderson v. Gilpin, 187 O. G. 231; Paul v. Johnson, 190 O. G. 807; Paul v. Johnson, 106 O. G. 2013; Davis v. Horton, 136 O. G. 1768. This late case is one in which the junior party had disclosed the invention to several persons and had ordered manufacture of the same prior to the entry of the senior party into the field, and a few months thereafter actually sold a small number, which was followed a few months later by the manufacture and sale of a large number of such devices, the junior party being thus found to be diligent in reduction to practice. These circumstances are almost on all fours with those in the present case on the question of diligence. See also Woods v. Poor, 130 O. G. 1313, in which it is held that the nature of the invention, the situation of the inventor, the length of time intervening between conception and reduction to practice, the character and reasonableness of the inventor's testimony and that of his witnesses, are all important factors in determining the question of diligence. These decisions are found in the volumes of Official Gazette of the United States Patent Office, and are, of course, decisions of which this court may take notice, being federal decisions, and particularly in view of the law above set forth, with respect to the effect of decisions of the Patent Office forum upon the federal courts of concurrent jurisdiction.

The situation in the present case shows Bole to have been actuated by animus, inflamed by the co-operation

of Wilson's chief and bitterest competitor in the underreamer field, the other part owner of the Bole patent in suit.

See also Lewis & Williams v. Cronemeyer, 130 O. G. 300; Lawrence v. Voight, 147 O. G. 235; Feinberg v. Cowan, 125 O. G. 667; Whitney v. Brewer, 177 O. G. 1267, in which it was found that the first filing of an application by a party does not preclude the application against him of the doctrine of equitable estoppel, and we contend that Bole is equitably estopped, because of his covenant not to do anything further about the invention, made at the time of the settlement with Wilson and his company, February 1, 1913. In Schmidt v. Clark, 138 O. G. 768, it was held that where the evidence fails to show any activity on the part of Schmidt from July, 1903, to December, 1906, when he filed his application, and in the meantime Clark enters the field and gives the public the benefit of his discovery by manufacturing several hundred devices embodying the invention; in order to prevail, Schmidt must prove his case beyond a reasonable doubt. Bole does not prove his case beyond a reasonable doubt, and shows no excuse for his lack of diligence. As to this rule of diligence, it was held in O'Connell v. Schmidt, 122 O. G. 2065, that there is no hard and fast rule by which to determine the question of due diligence. In other words, there is no general rule of what constitutes due diligence, that being a question to be determined by all the facts and surrounding circumstances in the particular case.

See also the important case of Garden Supply Co. v. National Washer Co., 176 Fed. Rep. 45, 47.

Further on this question of diligence, see Howell v. Hess, 122 O. G. 2393.

It is pointed out by Robinson on Patents, *supra,* section 1024, on page 38, the plaintiff inventor, although he be proven to be the first conceiver of the invention, may be shown by the defendant to forfeit his right to a patent in favor of a later inventor by his unreasonable delay in its reduction to practice. On this question of diligence, a leading case is Mason v. Hepburn, the decision being of the Court of Appeals of the District of Columbia, in 1898, 84 O. G. 147, particularly the last column of the opinion.

Of course, if Bole derived his invention from Wilson, as we contend, he is not entitled to a patent as issued.

*It is significant that we have proven by witnesses that Wilson disclosed the invention to Bole, and that we have only Bole's unsupported statement that he earlier disclosed the invention to Wilson.*

And that Bole is not to be believed is proven by the fact that at the time of the disclosure by Wilson to him, namely, the conference of about February 3, 1911, he laid no claim to being the originator of the invention. This man Bole, whose alleged witnesses to the sketch of January 27, 1911, did not ever remember having seen such sketch before they testified; who was contradicted by his friend Willard, and by Wilson, and whose witness Naphas does not know what he is talk-

ing about, is not to be believed himself. It is as plainly to be seen between the lines as though written in red ink, that this claim of Bole's and the harassment of Wilson and the defendant corporation, growing out of such claim, amounted to conspiracy of Bole's and Wilson's competitor, Double, to bring upon the defendants expense, annoyance, trouble and competition.

See Jenks v. Pagelson, 184 O. G. 285.

This derivation by Bole from Wilson led to Bole's surreptitious activity in obtaining a patent, within section 4920 of the Revised Statutes. As to Wilson's independence of any such derivation, see Miller v. Speller, 165 O. G. 732.

Concealment of an invention is also fatal, coupled with delay in reduction to practice, as per the doctrine in Mason v. Hepburn, *supra;* so that, if Bole had the invention before Wilson, his concealment estopped him from properly receiving a patent. See also Brown v. Campbell, 201 O. G. 903; Mathes v. Burt, 114 O. G. 764; Quenzer v. Collins, 179 O. G. 575; Brown v. Campbell, 201 O. G. 905; Baetz v. Kukkuck, 178 O. G. 887.

As to novelty, we have seen that the same is negatived by the making of a single specimen of the patented thing, provided its existence was known in this country prior to the invention by the patentee, even though it was not used prior to that time (see Walker on Patents, section 72, page 67, and cases cited), and novelty is negatived by prior knowledge and use in this country by even a single person of the thing pat-

ented, provided, of course, that it be a person other than the patentee and independent knowledge (Walker on Patents, section 71, page 66). (See also 46 Ct. Cl., 601.)

This, of course, must be so, under section 4886 of the Revised Statutes, in accordance with which patents for inventions are issued, it being required that the invention must be not known or used by others in this country before the invention or discovery thereof by the patentee. Assuming the acts of Wilson and Bole were independent and neither derived from the other, the making of the first under-reamer embodying the invention by Wilson is sufficient to invalidate the Bole patent, if Bole cannot prove that his invention was made still earlier than that anticipating fact occurred. This has nothing to do with the question of originality, as between Wilson and Bole, or of priority, as between Wilson and Bole, but is that other defense, namely, of anticipation by Wilson's manufacture, sale and use of Wilson reamers; and where, as in this case, we have proven manufacture and sale prior to Bole's date of application, the *burden is shifted to the appellees* to prove by convincing preponderance of evidence that Bole's invention was still earlier than that manufacture and sale took place. As to burden of proof in this respect. see also Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. R. 501. If the plaintiff does not introduce enough evidence to outweigh whatever evidence is introduced to the contrary, the patent must be void for want of novelty. Walker on Patents,

section 76, last paragraph, page 71, and the cases cited therein.

Now, as to this defense, it is contended that Bole has not established possession of the invention prior to the disclosure of the same to him by Wilson, and likewise the patent is therefore anticipated by this Wilson manufacture, and must be found invalid.

There are, therefore, three burdens resting upon Bole, one to establish originality, one to establish priority, and one to establish possession of the invention prior both to the disclosure of the invention to him by Wilson and prior to the Wilson manufacture and sale of the invention. As to originality, we contend that all of the facts and circumstances in the case are against him. As to priority, he must lose because of his lack of diligence, and as for his being in possession of the invention earlier than Wilson disclosed it to him, or Wilson commenced to manufacture, the gravest doubt is raised because of the circumstances of the case, and Bole's failure to speak out when Wilson commenced to assert his invention. This very failure likewise, with the other circumstances of the case, renders it unbelievable that Bole ever was in possession of the invention before he obtained the knowledge of the same from Wilson.

## Three Chief Defenses, and Each Sufficient to Reverse the Lower Court.

Thus we contend that appellants have prevailed upon these three defenses, that of want of originality in Bole, that of want of priority in Bole, and that of want of

novelty in the Bole patent. And in addition to that we have Bole barred by estoppel attaching to his covenant in favor of Wilson and his company.

See in this connection, upon the question of burden of proof, Clark Thread Co. v. Willamantic Linen Co., 140 U. S. 492; also 52 F. R. 760; 108 F. R. 221; 121 F. R. 53; 11 F. R. 155; and 20 F. R. 693.

Burden of Proof Shifted to Appellees.

The anticipatory fact consisting of manufacture and sale by Wilson of reamers embodying the invention prior to Bole's date of application absolutely shifts the entire burden of proof to Bole, and, therefore, on all the questions in this case, of originality, priority and of possession of the invention prior to Wilson's practice thereof, we must look to the appellees to make out their case beyond a reasonable doubt. They utterly have failed to make out any case of diligence with respect to priority, or to make any affirmative conclusive showing of originality, or to make any affirmative conclusive showing as to possession of the invention prior to the anticipatory act of Wilson manufacture. The laches of Bole are against him on all of these questions.

See also, on the question of novelty, 22 F. R. 650, 82 F. R 1897.

That Bole applied for patents on other inventions and delayed in applying on the key invention is competent evidence against his claim of invention, as in Frink v. Petry, 11 Blatchford, 1 Bann. and A 1.

That inference may be drawn by the court from the conduct of Bole which may outweigh direct testimony of any number of witnesses, see telephone cases, 126 U. S. 1.

That the commissioner of patents has judicial functions, of which the courts may take judicial notice, see Butterworth v. U. S. 112 U. S. 656, page 662, first column.

The question, of course, of want of novelty as defeating the Bole issued patent, was not for the Patent Office, as they could not cancel the patent, and that is an added defense in this suit, which makes Wilson's case even stronger than it was in the Patent Office, inasmuch as *the burden of proof is shifted by the anticipatory fact of Wilson's earlier manufacture to the appellees, and they must make out their case beyond a reasonable doubt.*

Bole cannot prevail on the score of priority of invention due to his total want of diligence, and he cannot prevail on the score of originality on his own unsupported word, with this burden of proof against him. Nor, in spite of all the circumstances, can he prevail on the ancient history of the 1908 legend with Adams' support, or by the improper deposition of Heber, with this burden of proof against him and the priority findings against him, such question of anticipatory use in this case being inseparably intertwined with the question of priority, and such anticipatory facts being part of Wilson's proofs of priority. So that Heber and Adams can be of no avail to Bole on priority, and, of

course, not on originality, and, likewise, not with respect to the anticipatory fact of Wilson's earlier manufacture and sale. At every angle of the case Bole is met with the closed door of laches, concealment, and estoppel, and with the fatal stabs of contradiction, want of corroboration, animus and improper motive.

The proofs in this case, more effectively than those possible before the Patent Office, make Wilson out the original and prior inventor of the subject of the patent in suit and make that patent out, therefore, invalid, and, likewise, and further, invalid because of the anticipatory manufacture and sale by Wilson of the reamers embodying the invention.

With all these facts and the law in connection therewith against the appellees, including the doctrine of Morgan v. Daniels, *supra,* and the persuasive effect of the findings of the Patent Office upon this court, it is contended that the appellees cannot prevail, because, and only because, of the unsupported, contradicted and discredited word of the appellee Bole plus his 1908 postal card.

The patent in suit should be found invalid upon the law and facts above set forth, and, therefore, upon the facts above presented, together with the remainder of the record in the case and the law as it stands pertinent to such record and facts, and the valid conclusions to be drawn from the record in such case, this case is respectfully submitted, with confident solicitation that the decree of the lower court be reversed in each and every respect.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,
*Solicitor and Counsel for Appellants.*

No. 2641.

IN THE

# United States

# Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

**Wilson & Willard Manufacturing Company and Elihu C. Wilson,**
*Defendants and Appellants,*
*vs.*
**Robert E. Bole and Edward Double,**
*Complainants and Appellees.*

## APPELLEE'S BRIEF.

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---

## APPELLEE'S BRIEF.

This is an appeal by defendants from an interlocutory decree ordering and granting an injunction against defendants.

Complainants filed their bill of complaint alleging the invention by complainant Robert E. Bole of the improvement in under-reamers in controversy; the filing in due form and time as required by law of an application by Mr. Bole for letters patent, the assignment of an undivided half interest in and to such invention to complainant Edward Double, and the grant, issuance and delivery in due form of law by the gov-

ernment of the United States of letters patent No. 1,080,135 on December 2, 1913, to complainants for said invention.

Complainants further alleged that the defendants, Wilson & Willard Manufacturing Company, and Elihu C. Wilson, its president and controlling stockholder and the actual director of its business and policies, were infringing said letters patent by making, using and selling underreamers embodying the said invention without the consent or allowance of complainants or either of them; and prayed an injunction to prohibit the continuance of such infringement and for the usual account of profits and damages arising out of such invasion of the patent franchise.

Defendants answered and by their joint answer asserted *only two defenses.* Defendants did not controvert that the invention covered by said letters patent was new and useful and patentable at the date of Mr. Bole's application for said letters patent, or that it had ever been anticipated. No issue as to the patentable novelty or patentable invention was raised by such answer. On the contrary, defendants rested their defense solely upon the two propositions:

*First:* That defendant, Elihu C. Wilson, was the inventor of the invention covered by said letters patent and that the application for letters patent by Robert E. Bole was fraudulent; that the patent in suit was void for the reason that defendant, Elihu C. Wilson, and not Robert E. Bole, was the original, first and sole inventor thereof.

*Second:* That as a part of a settlement of an account between Mr. Bole and the defendants, Mr. Bole did

> "withdraw and waive any claim or right of invention or interest whatsoever pertaining to the invention being said subject-matter of said pretended letters patent, and did covenant that in no way would said Robert E. Bole injure or cause injury to or damage or cause damage to said defendants in any manner whatsoever with relation to said invention the subject-matter of said pretended letters patent; whereby said complainant Robert E. Bole and said complainant Edward Double, assignee of one-half interest in and to said invention, if the allegations thereunto in the bill of complaint herein be true, is and are estopped from asserting any pretended right or claim, as in the bill of complaint herein may be set forth, against said defendants herein or either of them."

This case came on for hearing before His Honor Judge Oscar A. Trippet at Los Angeles in open court under the new equity rules, and the testimony of all the witnesses (except one) was taken in open court and Judge Trippet saw the witnesses, observed their demeanor upon the stand, heard their testimony, and in the majority of cases, as the record shows, himself questioned each witness in regard to one or more statements of the witness's testimony. The trial consumed six court days.

The issues tried were issues of fact and were determined by His Honor Judge Trippet after hearing the conflicting evidence of the witnesses on behalf of

the parties. He had a full opportunity to observe the witnesses, the manner of giving their testimony, and to judge of their credibility.

It will be found that there is no evidence whatever to support the second defense.

*The first defense,* to-wit: that Elihu C. Wilson, and not Robert E. Bole, was in fact the inventor of the improvement in underreamers covered by the letters patent in suit, *is a question of fact.*

> "A question of invention is a question of fact, and not of law."
>
> Walker on Patents, section 42;
>
> Poppenhusen v. Falkes, 5 Blatch. 49;
>
> Shuter v. Davis, 16 Fed. 564.

As will be pointed out hereinafter that question of fact has been decided by His Honor Judge Trippet after considering the conflicting testimony of the witnesses and after observing their demeanor upon the witness stand. It is undoubtedly the purpose of the new rules in equity, providing as they do for the hearing of equity cases upon the testimony of witnesses educed in open court, that the trial judge shall have a better opportunity to observe the character and demeanor of the witnesses and be in a better position to judge as to their credibility, etc. In this respect a final hearing or trial in equity under the new rules is in all respects like unto a trial of an action at law without a jury and the findings of fact of the trial judge are entitled to the same weight. In any event, however, the findings of fact of the lower court will

not ordinarily be reversed upon appeal where there is conflicting evidence. In fact the findings of fact of the lower court are presumptively correct, and, as stated by the Circuit Court of Appeals of the 8th Circuit in *Kinloch Tel. Co. v. Western Electric Co.*, 113 Fed. 659-665, "ought not to be reversed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the facts."

See, also:

National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 716;
Mann v. Bank, 86 Fed. 51, 53;
Tilghman v. Proctor, 125 U. S. 136;
Kimberly v. Arms, 129 U. S. 512;
Furrer v. Ferris, 145 U. S. 132, 134;
Warren v. Burt, 58 Fed. 101, 106;
Plow Co. v. Carson, 72 Fed. 387, 388;
Trust Co. v. McClure, 78 Fed. 209, 210;
Exploration Co. v. Adams, 104 Fed. 404, 408.

The issue tendered by the first defense is: Was Elihu C. Wilson and not Robert E. Bole the inventor of this invention? The letters patent issued to complainants are *prima facie* evidence that Robert E. Bole was the inventor and it is for him who contends to the contrary to prove such contention beyond reasonable doubt, for in case of doubt the *prima facie* presumption of the patent resolves the question in favor of the validity of the grant. This *prima facie* presumption

of the validity of patent and that Mr. Bole was the inventor follows clear through the attack on the validity of the patent and places the burden on defendants of proving beyond reasonable doubt the truth of their contention.

That defendants have failed utterly to sustain this burden of proof is apparent from the remarks of Judge Trippet when deciding this case in the trial court. Judge Trippet, after hearing the testimony given and observing the demeanor of the witnesses on the stand, says:

> "I am thoroughly convinced that the complainant, Bole, invented the key in controversy, and is justly entitled to a patent. If there had not been a patent issued in the case, or if the patent had been issued to the defendant, I should decide this case in favor of the complainant, Bole."
>
> "I have not the slightest doubt about how to decide this case, and I decide it in favor of the complainants."

It is apparent that the trial court did not decide the case upon a failure of the proofs on behalf of defendants to measure up to the burden cast by law upon them, but upon the conviction, without the slightest doubt, that the testimony of the witnesses proved that Mr. Bole was the inventor. In reviewing such decision, it is seen that the burden on this appeal on the defendants-appellants is an extremely heavy one. Not only must they ask this court to say,—without seeing the witnesses or having any opportunity of judging from their appearance or demeanor or their apparent frank-

ness or lack of frankness, or their hesitancy, the weight to be given to their respective testimony,—that not only was the trial court in error in being "thoroughly convinced" without "the slightest doubt" that complainant Bole was the inventor, but that beyond reasonable doubt the only conclusion to be drawn from the evidence is that Mr. Wilson and not Mr. Bole is the inventor. That there is evidence upon which to sustain the finding of fact of the trial court cannot be denied. In fact there is hardly a probative fact as to which there is not conflicting evidence and this court is asked to reverse the lower court's finding of fact and say that such lower court erred in believing the witnesses it believed after both seeing the witnesses and hearing their testimony given.

That the correct rule of law as to burden of proof is, as herein stated by complainants-appellees, clear.

In Ross v. Montana Union Ry. Co., 45 Fed. 425, Judge Knowles sitting in the District of Montana in charging the jury said:

> "It is for you to determine from the evidence whether or not he is the original and first inventor of this car. He has introduced his patent, derived from the United States, for this car. This patent affords, *prima facie,* a presumption that the plaintiff, Ross, was the original and first inventor of this car. The defendant may over throw this presumption, but in order to do this it must establish that he is not such first and original inventor by evidence so strong and convincing that you can say that he is not the first and original inventor of this car, to a moral certainty. A moral certainty

is that high degree of probability, though less than absolute assurance, that induces prudent and conscientious men to act unhesitatingly in matters of the gravest importance. This instruction as to moral certainty is equivalent to the instruction that is generally given in criminal cases, that a jury must be satisfied beyond a reasonable doubt of the guilt of a defendant, and, if there is a reasonable doubt in the mind of the jury, it must then be resolved in favor of the defendant; and in this case the reasonable doubt that may be in the minds of the jurors as to who is the first inventor should be given to the one who has the patent for the invention. If you are not satisfied to a moral certainty of it, that is beyond a reasonable doubt, that the plaintiff is not the inventor, then you should find that he is the first and original inventor."

This court, then consisting of Circuit Judge McKenna and Judge Ross and Knowles, in *Hunt Bros. Fruit Packing Co. v. Cassidy,* 53 Fed. 260, said:

"The evidence given by Cassidy concerning the Alden dryer was brought out by defendant on cross-examination. It would appear to have been an attempt on its part to make out its defense in this way. If the evidence of Cassidy had any tendency to make out defendant's defense, it was a matter for the jury to determine its weight. And they should have been able to find from it, beyond reasonable doubt, that there was no invention in his patented devices, or that it had been anticipated. Coffin v. Ogden, 18 Wall. 120; Walk. Pat. § 76."

In Carnegie Steel Co. v. Cambria Iron Co., 89 Fed. 720, it is said:

> "The burden is on the respondent for the grant of the patent is *prima facie* evidence that the patentee was the first inventor of what he described and claimed. Seymour v. Osborne, 11 Wall. 516."

See also

Patterson v. Duff, 20 Fed. 641.

The situation is this then: the trial court found that the defendants-appellants had not sustained the burden of proof which rested upon them to prove that Mr. Bole "obtained all his knowledge and information with respect to such subject matter (the invention in issue) from the defendant herein, E. C. Wilson," as pleaded in paragraph V of the amended answer [Transcript pages 18-19]; that on the contrary the trial court was "thoroughly convinced" without "the slightest doubt" that Mr. Bole was the original and true inventor.

The issue made by the answer was not did Mr. Wilson invent or produce this improvement before Mr. Bole invented it but "Did Robert E. Bole invent it and disclose it to Mr. Wilson or did Mr. Wilson invent it and disclose it to Mr. Bole." A careful consideration of the issue as framed by the amended answer clearly shows that this is the issue raised by such answer.

The question is not one of priority of time of invention but one of fact as to whether Mr. Bole or Mr. Wilson was the inventor. There can be no claim made

under the issues of the pleadings that Mr. Bole and Mr. Wilson were independent inventors. The issue is simply which one of these two men was in fact *the* inventor.

The pleadings on behalf of defendants, the opening statement of counsel for defendants, and the testimony educed on behalf of defendants all admit that both Mr. Wilson and Mr. Bole had full knowledge of the invention at one and the same time,—if any credence is to be given to defendants' witnesses testimony. The claim on behalf of defendants is that this invention was first talked over on February 3, 1911, by Mr. E. C. Wilson, Mr. Bole, Mr. Wilson's brother W. W. Wilson, Mr. C. E. Wilcox and others. If this is believed,—and it is the basis of this defense,—then it is positively shown and admitted that Mr. Bole had full knowledge of the invention at that time. It follows if Mr. Bole was the inventor at that time, then no subsequent act on the part of E. C. Wilson could make him the first and true inventor and it becomes immaterial, so far as establishing whether Mr. Bole or Mr. Wilson was the original, first and sole inventor, what thereafter either Mr. Bole or Mr. Wilson did with the invention. Under the issues and under the evidence on behalf of defendants either Mr. Bole or Mr. Wilson was on February 3, 1911, the inventor. One or the other of these men, *according to defendants' pleadings and testimony,* secured all his knowledge and information with respect to this invention from the other at that time. If this premise is correct then it follows that the contention made in this court that the manufacture and sale of

underreamers by the defendants for twenty-two months prior to the date of the filing of the application for patent by Mr. Bole is an anticipation or that any question of diligence is at issue are founded on error. How can it be found as a matter of fact or law that anything that happened after this date (taking defendants' contentions as to the February 3, 1911, conference as a fact, for the purpose of argument) could constitute Mr. Wilson an original inventor or Mr. Bole an original inventor if at such time the invention was explained to him by the other? In other words, if Mr. Bole explained this invention to Mr. Wilson at that time, then nothing thereafter happening could make Mr. Wilson the original inventor. If Mr. Wilson at that time explained this invention to Mr. Bole then nothing that either party did thereafter or could do thereafter could make Mr. Bole the original inventor. It follows, therefore, that defendants must prove that Mr. Wilson was on that date the original inventor and on that date explained this invention to Mr. Bole or this whole defense falls.

There is no pretence on the part of defendants that at any other time Mr. Wilson was the original inventor or that he made and used underreamers embodying the invention without Mr. Bole's knowledge. The defense is absolutely predicated on this alleged explanation by Mr. Wilson to Mr. Bole on that date and if it fails as to such explanation by Mr. Wilson or fails to show that at that date Mr. Wilson and not Mr. Bole was the original inventor, then the defense fails utterly, as it is admitted by defendants that there was an ex-

planation of the invention at that time. It is not in the mouth of defendants to claim that if their testimony is found false as to there having been an explanation of the invention at that time, they should be believed in the denials by the impeached and contradictory testimony of E. C. Wilson that Mr. Bole explained the invention to Mr. Wilson prior to that date. Any contention that Mr. Wilson was an independent or original inventor of this subject matter, unless it is founded upon this alleged conference of February 3, 1911, and the alleged explanation at that time of the invention by Mr. Wilson or Mr. Bole, is utterly impeached by the testimony of Mr. E. C. Wilson himself. Any such contention is utterly inconsistent with the theory upon which the case was tried by defendants and utterly at variance with the testimony of Mr. E. C. Wilson. Therefore, again complainants reiterate the assertion that the sole issue is one of originality of invention as between Mr. Bole and Mr. E. C. Wilson and that the making, use or sale of underreamers embodying the invention throws no light whatever upon this issue and does not raise any other issue of law or fact to be determined.

If Mr. Wilson explained this invention to Mr. Bole then Mr. Bole could not thereafter become the original and true inventor. Conversely if Mr. Bole explained the invention to Mr. Wilson, nothing that Mr. Wilson could thereafter do could make him the original, first or true inventor.

*The sole issue then is who was the inventor?*

We have already seen that the burden of proof on this issue is upon the defendants-appellants. And we assert that the court must find that this alleged conference was called on February 3, 1911, by Mr. E. C. Wilson and that he prior to that time was the original, first and sole inventor or that the defense utterly fails. For the sake of argument complainants might safely admit that such a conversation took place. That no such *conference* was called and that Mr. E. C. Wilson is drawing upon his imagination that he called such a conference for such purpose is established beyond the peradventure of doubt. It is denied by Mr. Wilson's brother W. W. Wilson, Mr. C. E. Wilcox, Mr. Willard and Mr. Bole,—each and every one of the men Mr. E. C. Wilson claims to have called to such conference. Defendants' counsel may urge that Mr. E. C. Wilson may have been mistaken as to calling such a conference and that the entire talk was an accident and that the participation of any of the others in any such a conversation was merely a coincident,—an accidental happening. This is utterly at variance with the testimony of E. C. Wilson, who has reiterated time and again that he called a conference of these men to discuss this matter. If Mr. E. C. Wilson is wrong as to this fact of his having called a conference of these men to discuss this matter. If Mr. Wilson is for this purpose, he is equally clearly shown to be in error as to the other facts of the alleged conference or conversation. The entire unreliability of his testimony as to such conference or conversation is conclusively

shown by this denial of the manner of its inception. *This is extremely significant as it is on Mr. E. C. Wilson's own testimony alone and uncorroborated* that it is sought to show that he in fact ever had a conception of the invention prior to this conference or that he made the sketch which is alleged to have been in his hands at such conference. The vital fact, the one fact which determines this issue, did Mr. E. C. Wilson conceive this invention before this conference and did he make the sketch which he had at this conference, rests solely upon his own testimony. He does not claim to have explained the invention to anyone prior to this alleged conference and no one testifies that he saw Mr. E. C. Wilson make the sketch. It is not produced. No one testifies that he remembers that it was in Mr. E. C. Wilson's handiwork. It is shown that both Mr. Wilson and Mr. Bole were making sketches before any of the witnesses observed anything of this conversation or heard any of it. The point we make is that so far as the testimony of either Mr. Willard, Mr. W. W. Wilson or Mr. C. E. Wilcox goes, the alleged sketch in the possession of Mr. E. C. Wilson at the time W. W. Wilson and C. E. Wilcox testify they heard conversation, may have been made by either Wilson or Bole. The burden of proving that E. C. Wilson made that sketch and made it as his independent conception of this invention rests upon the defendants and upon such issue we have only the uncorroborated testimony of Mr. E. C. Wilson. He is impeached by the testimony of his own witnesses as to the alleged calling of such conference.

His testimony is positively shown to be false in regard to this material fact. Why, then, should he be believed as to his assertion that prior to such conversation he had conceived the idea of this invention and that he made the sketch which he claims to have had in his hand at the time a part of the conversation between Mr. Bole, Mr. Willard and himself was accidentally overheard by his brother W. W. Wilson and Mr. Wilcox? If the lower court, having observed his demeanor on the stand and having heard his testimony given, refused to believe his uncorroborated testimony that he had conceived this invention prior to this conversation and that he made the sketch which he had in his hand when he stepped back from the shipping desk, is this court to say that unquestionably the trial court was wrong? Which is and was in the better position to judge of the credibility of the witness?

It is very significant that the one most vital fact of this defense rests on the uncorroborated testimony of Mr. E. C. Wilson. To support the defense it must be established that Mr. E. C. Wilson and not Mr. Bole was the originator or inventor. The defense rests upon the impeached testimony of Mr. E. C. Wilson for its two most vital facts. If these two facts be not proven then the defense falls.

We have only the testimony of Mr. E. C. Wilson that he conceived this invention before this conversation. We have only his testimony that he made the sketch. The testimony of his brother goes no further than that E. C. Wilson had a sketch in his hand when he, W. W. Wilson, came up to where he says E. C.

Wilson, Mr. Bole, Mr. Willard and Mr. C. E. Wilcox were talking. The testimony of Mr. Wilcox shows that he does not know who made the sketch. He so states. Mr. Wilcox testifies that he from a distance saw E. C. Wilson, Mr. Bole and Mr. Willard around the shipping desk in the back of the shop and that they were bending over the desk. That both E. C. Wilson and Mr. Bole had pencils in their hands and were making sketches. That he took no part in the conversation and was not a party to it. That after these three had been talking for some time E. C. Wilson stepped back from the desk with a sketch in his hand and said: "Oh, I know how to get it in there, but I don't know how to get it out." Mr. Bole says, "Pry one end of it up and drive it out." [Tr. p. 27.] Mr. Wilcox unequivocally states that he did not know and does not know whether it was Mr. Bole or Mr. E. C. Wilson who made the sketch that Wilson had in his hand. [Tr. p. 258.] Mr. Wilcox was called on behalf of the defendants and was one of their employees.

Naturally it is to be expected that the testimony of W. W. Wilson will be as favorable as possible to his brother. Yet on this most vital question of whether E. C. Wilson had any conception of this invention prior to this alleged interview of February 3, 1911, and on the attendant almost equally important question of whether E. C. Wilson made the sketch he is alleged to have had at this conversation, W. W. Wilson does not support his brother's testimony. W. W. Wilson says that as he was passing through the shop he stopped and talked with Mr. Knapp a few minutes;

"then it came to my attention that Mr. Willard, Mr. Bole and Mr. E. C. Wilson *and Mr. Wilcox* were standing near one of the shapers, near the back shaper in the shop, looking at an underreamer which was lying on the floor. And so I stepped up to the conference and saw there my brother had a sketch on one piece of paper, *or several sketches on two or three pieces of paper,* showing different types of keys." [Tr. p. 273.] "I was not invited into the conference." [Tr. 293.] He admits that he was not present when the conversation between Mr. Bole, Mr. Willard and Mr. E. C. Wilson started and does not know how long they had been talking before he joined them. [Tr. p. 292.] If then reliance is to be given to the testimony of defendants' witness, Wilcox, that the sketch was made at the shipping desk it is apparent that Mr. W. W. Wilson can know nothing concerning who made the sketch. The utter unreliability of the memory of Mr. W. W. Wilson and the lack of dependence to be given to his testimony is shown by the contradictory character of his testimony and by the fact that he testified that there was no contract in writing in settlement between the Wilson & Willard Mfg. Company and Mr. Bole in 1913 when the settlement of the Bole Pump matters was arranged and the fact that after giving such testimony the original of such contract in writing was presented to him and he was forced to admit that he had signed as a witness to such contract. [Tr. pp. 291-292.] In testifying to such matters he was only searching his memory in regard to an occurrence which happened a little over a

year prior to giving his testimony. In testifying in regard to this sketch and this conversation he was testifying to matters that are alleged to have occurred another two years prior to that, and as to which the further lapse of time had dimmed his recollection.

The conflict of the testimony of defendants' witnesses as to this sketch is further exemplified by reference to Mr. Wilcox's testimony that after Mr. E. C. Wilson turned away from this shipping desk over which he, Bole and Willard had been "huddled" no changes were made in the sketch nor were any additions or alterations made in such sketch [Tr. p. 257, also p. 263], while Mr. W. W. Wilson, although asserting that Mr. Wilcox was present and took part in the conversation, testifies that alterations were made in the sketch by E. C. Wilson. [Tr. 294.] While W. W. Wilson has the impression and attempts to state positively that his brother E. C. Wilson had several sketches in his hand of different shapes of keys at this time [Tr. p. 294], Mr. Wilcox point blank says there was only one that he saw. [Tr. 259 and 263.] W. W. Wilson testifies that he joined Mr. E. C. Wilson, Mr. Bole, Mr. Willard and Mr. Wilcox and then saw these sketches and heard this conversation. Mr. Wilcox testifies that he was not a party to the conversation at all and that after Mr. E. C. Wilson turned away from the shipping desk with the sketch in his hand and said to Mr. Bole, "Oh, I know how to get it in there, but I don't know how to get it out," and Mr. Bole said "Pry one end of it up and drive it out." [Tr. p. 248.] "They passed out of my hearing, and that

was about all I heard at that time." W. W. Wilson testifies that he joined E. C. Wilson, Mr. Bole, Mr. Willard, Mr. Wilcox and possibly Mr. Knapp and then heard this same conversation and even says that Mr. Wilcox said "Yes, pry it out." [Tr. p. 274.] Mr. Wilcox says he took no part in the conversation whatever.

There is clearly a most marked contradiction in this testimony. *But* there is a total failure of any testimony whatever by either Mr. Wilcox or W. W. Wilson which will deny that the sketch had been made by Mr. Bole or that will establish that the sketch had been made by E. C. Wilson. Both Wilcox and W. W. Wilson admit that they did not hear all the conversation nor the beginning of the alleged conversation. Neither claims to have seen the sketch made. Neither therefore was in a position to say that E. C. Wilson explained the key to Mr. Bole or to say that Mr. Bole explained the key to E. C. Wilson. The testimony of these witnesses, C. E. Wilcox and W. W. Wilson, must, from their lack of opportunity to have heard the conversation, be totally silent on these vital questions of who explained the key invention to the other and who made this sketch. There is a total absence of any corroboration of E. C. Wilson's claim that he made the sketch or that he explained the invention to Mr. Bole at this mythical "conference" which he says he called of Mr. Willard, Mr. Bole, Mr. W. W. Wilson, Mr. C. E. Wilcox and perhaps Mr. Knapp, *and which is denied by every one of these men.* The burden of proof is on defendants. Not on complainants.

Defendants admit that Mr. Wilson and Mr. Bole both were in possession of this invention on February 3, 1911, and talked together of it. The burden is on the defendants to prove that E. C. Wilson originated it and disclosed it to Mr. Bole. Merely showing that both Wilson and Bole knew of it February 3, 1911, proves nothing as to whether Wilson or Bole was its author.

On such conflicting testimony how can this court say the trial court was undoubtedly wrong in its finding of fact? Who knows to what extent the manner and demeanor of the respective witnesses indicated their frankness and truthfulness?

The testimony of Mr. E. C. Wilson, W. W. Wilson and C. E. Wilcox, called by defendants, is an admission on the part of the defendants that both Mr. E. C. Wilson and Mr. Bole on February 3, 1911, were in possession of this invention. One or the other of them was the inventor at that time or prior to that time. No act of either of them subsequent to this admitted date when the invention was discussed by them can change the fact as to who was the inventor. Either Mr. E. C. Wilson derived his knowledge of the invention from Mr. Bole and by no act could thereafter become the original and true inventor or he was the true and original inventor at that time and disclosed the invention to Mr. Bole.

Complainants therefore repeat that except to enable the court to judge the trustworthiness of the testimony of the witnesses and the weight to be given to their testimony, the subsequent acts of any of the parties

in building underreamers is immaterial. It might throw light on the weight to be given to their testimony but it cannot and does not change their rights or characterize by such subsequent acts either of them as the true and original inventor or discoverer of this invention.

The testimony of the witnesses for defendants proves beyond doubt that Mr. Bole was in possession of the invention as early as February 3, 1911. Unless it proves that he derived this knowledge of the invention from E. C. Wilson, the defendants' case falls. Not only has a patent been issued to complainants, raising a *prima facie* presumption that Mr. Bole was the original and true inventor but it is thus conclusively shown that he was in possession of the invention prior to the commencement of making by Wilson of any underreamer embodying the invention. In other words, complainants insist that the testimony shows that either Bole communicated the invention to E. C. Wilson or E. C. Wilson to Bole before the commencing of the making of the first underreamer embodying the invention, and that if the defendants are to succeed in their defense they must prove that Mr. Wilson was the first to conceive this invention, that he was the originator of it, and that he explained it to Mr. Bole.

The record in this case is a full and direct admission on the part of E. C. Wilson and of his witnesses that the invention was fully discussed between E. C. Wilson and Mr. Bole as early as February 3, 1911. If Mr. Bole was the originator or inventor at that time

then Mr. Wilson derived his knowledge of the invention from Mr. Bole and no subsequent act of either party could change that status and make Mr. E. C. Wilson the one who first conceived the invention and explained it to Mr. Bole. To prove this latter is the burden assumed by defendants by their answer. The trial court not only held that defendants had failed to prove this but that the testimony "thoroughly convinced" without "the slightest doubt" the trial court that Mr. Bole was the inventor and that Wilson derived his knowledge of the invention from Mr. Bole.

There is no dispute but that Mr. Bole never built an underreamer embodying this key invention. The Wilson underreamer was manufactured by the defendant Wilson & Willard Manufacturing Company for defendant E. C. Wilson under the monopoly of the patent to E. C. Wilson granted July 31, 1906, number 827,595. [Tr. p. 740.] This patent covers broadly the general interrelation of the parts, while the invention in dispute in the case at bar is merely an improvement in the means for assembling and holding in assembled position the spring actuated rod or tee upon which the reaming bit or cutters are mounted and by which they are operatively connected with the body of the device. The present invention is a substitute for the block 7 and dowel pins 8 of the Wilson patent. Without a license from Mr. E. C. Wilson Mr. Bole could not make underreamers. The patent in suit is for an improvement and is dominated, so far as the Wilson type of reamer is concerned, by the Wilson patent. Mr. Bole was in equally as impossible a posi-

tion with respect to the so-called "double" or "union" reamer. It was covered by patents. He could not use his invention in either of these constructions of reamers without infringing patents held by others. Mr. Bole's only chance to derive any advantage or profit from his invention was in licensing either the defendants or the owners of the "double" patents to use his invention. If he was satisfied to permit Mr. Wilson to thoroughly try out the invention before settling with him on a royalty, he had a perfect right to do so. In fact it would not take away his right either to a patent or to stop Mr. Wilson's continuation of the use of his invention whenever he, Bole, saw fit to notify him to stop the use of the invention, for Mr. Bole to permit Mr. Wilson at his, Mr. Bole's, will to freely use the invention. It was at most a gift privilege,—without consideration,—and a license which Mr. Bole could revoke at pleasure. From its use Mr. Wilson acquired no rights. To hold that defendants acquired any right to the invention or to its free use forever under such circumstances would simply be to hold that the strong may take that which belongs to the weak, and neither the law nor equity will afford him a remedy. This is what the trial court meant when it said:

> "He (Bole) was not in a situation to put it into practical use until his relations with that company were severed. He applied to the defendant to put the key into use."

The relations referred to as existing between the Wilson & Willard Manufacturing Company and Mr. Bole were not those of employer and employee, during

1911 or 1912. The relations were those of joint interest in the manufacture and sale of the Bole pump, which pump was manufactured by the Wilson & Willard Company and for and on behalf of Mr. Bole, the Wilson & Willard Company deriving the manufacturers' profit and Mr. Bole the sales profit. In law they were doubtless partners in that business at that time. Mr. Bole was not in financial condition to manufacture underreamers and he had no underreamer to manufacture. The invention in issue is merely an improvement in the means for holding the operative parts of an underreamer in working relation and permit ready assemblance and quick and easy taking apart. The substantial working parts of the underreamer were covered by the Wilson patent.

WHY DID THE LOWER COURT NOT BELIEVE MR. E. C. WILSON'S TESTIMONY THAT HE MADE THE SKETCH AND WAS THE INVENTOR?

As we have seen there is produced no testimony of any other person, than E. C. Wilson himself, tending to show any knowledge, on the part of any of the witnesses produced on behalf of the defendants, whether Mr. E. C. Wilson was the originator of this invention or whether *he made* the sketch which he is alleged to have had during this conversation of February 3, 1911, or what conversation or conversations he had previous thereto with Mr. Bole and Mr. Willard, or with Mr. Bole alone, in regard to this invention.

On direct examination Mr. E. C. Wilson says that *"I called* some of the boys together" *"in that confer-*

*ence*—there was Mr. Knapp, I believe, Mr. Wilcox, possibly my brother W. W., and Mr. A. G. Willard and Mr. Bole. We were *all* in conference over this key proposition." [Tr. p. 106.] On this statement we have already seen that he is contradicted by the testimony of Mr. Wilcox and by the testimony of his brother W. W. Wilson. Mr. Willard says he does not remember any such conference. And Mr. Knapp was not there.

E. C. Wilson's version of the conversation is totally different from that of either his brother, W. W. Wilson, or of C. E. Wilcox. E. C. Wilson admits that Mr. Bole suggested to pry it out and says that he said, "Very well. We will admit that it can be pried out, but won't it give so much trouble in doing so that it will probably condemn it and the drillers won's use it? He says, 'No; I can devise a tool which will pry it out.' I said, 'I can devise a tool that will pry it out, but I think it will give us a good deal of trouble.' After further discussion *the boys agreed* with me that that was the better style of key and it was well worth trying, and with that point settled we proceeded to make up a single-piece key as I desired. That was the genesis of that key." [Tr. p. 107.]

On page 117 of the transcript is found E. C. Wilson's answer when he again reiterates that *all* of these parties were present "at that conference."

On cross-examination Mr. E. C. Wilson says that it seemed to him that he left the office in company with either Mr. Willard or his brother and went into the shop or possibly Mr. Bole was with them at the time

they walked back to the shop and he announced his intention to change over the reamer. [Tr. p. 177.]

On page 176 of the transcript Mr. E. C. Wilson says it might have been longer than two minutes that he had talked with Mr. Willard and Mr. Bole before his brother W. W. Wilson joined them.

In his testimony in the Interference in the United States Patent Office we find a decided difference. His testimony in the Interference was given a year prior to the trial of this case. Then Mr. Wilson testified, "One evening I decided to obtain the opinion of some of the men in the shop in regard to the relative merits of the different types of keys which I had evolved in my mind. As I have previously testified, *I called* Mr. Willard and Mr. W. W. Wilson and Mr. C. E. Wilcox and Mr. R. E. Bole, and it seemed to me that I had Mr. Knapp in that conference also." [Tr. p. 723.] Further on he says, "Now, these gentlemen all agreed that the single-piece key was the better type." [Tr. p. 724.] Yet as we have seen Mr. C. E. Wilcox testifies that he was not a party to and took no part in that conversation. W. W. Wilson says he was not called or invited to such "conference."

Remembering that Mr. Wilcox says he first saw Mr. E. C. Wilson, Mr. Willard and Mr. Bole huddled over the shipping desk in the rear of the shop and after that E. C. Wilson stepped back away from the desk with a sketch in his hand and made the remark, "Oh, I know how to get it in there, but I don't know how to get it out," and Mr. Bole said "Pry one end of it up and drive it out" [Tr. p. 248], and then Mr. E. C.

Wilson passed close enough to him, Wilcox, to enable him to see the sketch as he went by and that he, Wilcox, took no part in the conversation whatsoever, and that W. W. Wilson and Mr. Knapp were talking together at a point still further away, it is to be noted that E. C. Wilson testifies that according to his recollection he was NOT at the shipper's desk PRIOR to this conversation between Mr. Bole and himself which he has detailed; from his testimony on cross-examination he would have us believe that this conversation in which he says Mr. Wilcox and his brother, W. W. Wilson, took part, took place *before* they (E. C. Wilson, A. G. Willard and Mr. Bole) went to the shipper's desk; that according to his recollection they just loitered over toward the shipper's desk and that no sketches were made there. [Tr. pp. 171 and 173.]

At another point in his testimony he says that it was in the latter part of the conference that A. G. Willard, Mr. Bole and he were at the shipper's desk and that they were not, prior to the conversation which he repeated, together at this shipping desk discussing anything or making any sketches. [Tr. pp. 168, 169.]

In one breath E. C. Wilson testifies that he called a "conference" of these men mentioning his brother in particular and that they were all together when this conference took place and that they all took part in the discussion. In another breath he says that he does not know just when it was that his brother arrived at such conference; that he had been talking with Mr. Willard and Mr. Bole for some time before his brother arrived; in another breath he testifies that his brother

walked with him from the office into the shop prior to this converstion and was with them at the start of the conversation. Then [Tr. p. 167] he says that Mr. Willard, Mr. Bole, Mr. Knapp and his brother, W. W. Wilson, were present when the talk started; then that he is not positive whether his brother was there at the commencement of the talk. He does positively state that after they had been discussing the matter a little while he asked C. E. Wilcox about it. [Tr. p. 167.] Then although he has positively stated that this conversation took place before Mr. Willard, Mr. Bole and himself went to the shipping desk he testifies [Tr. p. 168] that he does not remember whether they were at the shipping desk before the conversation which he has detailed took place; (the conversation took place over the underreamer bodies lying on the floor of the shop). Then again in the next breath he states positively that he was not at the shipper's desk prior to such conversation.

A reading of the cross-examination of Mr. E. C. Wilson demonstrates conclusively that his memory is far from clear as to any one of the attendant circumstances of this alleged conference which he so glibly asserts he called and which calling is denied by each of the parties supposed to have been called to such conference. Not one of them admits that Mr. Wilson called or asked him to become a party to this conference. Mr. Wilson's testimony on cross-examination conclusively shows that his memory is utterly unreliable and uncertain as to every material fact and his testimony necessarily fails to carry conviction. Appellees

feel safe in asserting that his testimony taken as a whole does not show an accurate *memory* of the things he attempts to assert as facts. On the contrary it shows that he is testifying not from what he distinctly remembers, but as to the things which he thinks must have happened and must have been the facts, reasoning from deduction and not testifying from memory. There is the most marked discrepancy between Mr. Wilson's testimony and that of the men called to corroborate him and this discrepancy exists in regard to every fact save and except that Mr. E. C. Wilson admitted after there had been conversation that he did not know how to get the key out and that Mr. Bole told him how,—said pry one end of it up and drive it out.

As we shall show hereafter there was positive proof produced that Mr. Bole had conceived this invention in September, 1908, and had communicated the same, by a written order for an underreamer embodying the invention, to the defendant company. Is it not consistent with human experience that the immediate and unhesitating statement of Mr. Bole that this key could be removed by prying one end of it up and driving it out (which is the method of removing it as used even to this day) was made by Mr. Bole because of a superior and prior knowledge of the device?

Is it not a fair inference to draw that if any such conversation ever took place, the sketch which Mr. Wilson held in his hand at the time was a sketch which Mr. Bole had made and was a part of the explanation by Mr. Bole to Mr. Wilson at the shipping

desk and that Mr. Wilson when turning away from the desk saying: "I can see how I can get it in but I can't see how I can get it out," actually admitted that he was talking about Mr. Bole's suggested key invention which had been then explained to him and discussed between them and was asking for a further explanation as to how such key could be removed? It is admitted that Mr. Bole knew how to remove such a key and it is admitted that Mr. Bole disclosed how to remove the key. If we are to believe this story at all it would seem that Mr. Wilson had in his hand a sketch of what had been suggested to him by Mr. Bole; that he, Mr. Wilson, was satisfied that *the thing* shown in that sketch would do the work and could be got into place into the reamer but that he had not yet received from Mr. Bole sufficient information to convince him how such key or device could be used practically, i. e., could be removed when it was desired to remove the bits, and that he was seeking further information from Mr. Bole when he made the remark, "I can see how I can get it in but I don't see how to get it out."

Yet it is on the testimony of the defendant E. C. Wilson alone that defendants must rely to prove that E. C. Wilson was the originator of this invention; that he had conceived this key invention before this conference; and that he, E. C. Wilson, made this sketch of the invention and explained it to Mr. Bole. Of these two asserted facts there is no corroborating evidence produced by defendants. Both are denied by Mr. Bole. Yet it is absolutely necessary that the court

shall find, first: that E. C. Wilson was the one who first conceived or thought of the use of the single-piece key in this relation; and second, that it was E. C. Wilson and not Mr. Bole who made the sketch,—particularly that it was Wilson's explanation to Bole,—not Bole's explanation to Wilson.

The testimony of C. E. Wilcox certainly is consistent with either Bole's being the author of the sketch and it being Bole's explanation to Wilson, or with Wilson's being the author and explainer to Bole. On this crucial fact Mr. Wilcox admits he was not in a position to know the facts. The testimony of W. W. Wilson shows that he was equally ignorant of these facts. The conversation had progressed sometime before he joined in it and the sketch had been made before he observed the parties talking.

The contradiction and impeachment of E. C. Wilson's testimony is complete as to every fact that can throw the slightest light upon whether he was the originator or whether he received his knowledge from Mr. Bole.

Mr. Wilson says: "It is my recollection that the sketch was made up on a piece of brown paper in the same manner that this tee is made up." (Referring to the sketch he claims he gave to Mr. Knapp as a part of the instructions for making over reamer #120.) In testifying in the Interference proceeding in the U. S. Patent Office, E. C. Wilson refers to this mythical sketch and to its delivery to the foreman, Mr. Knapp, as follows:

"after I had made my sketch of this key and turned it over to the foreman to manufacture the key." [Tr. p. 726.]

Mr. E. C. Wilson also says: "The key was made up, probably, from the one (sketch) I showed the boys at the time, one of these original sketches." [Tr. p. 108.] This sketch, if any such ever existed, would have formed a part of shop order 6904 and would have been found attached thereto in the same manner as the sketch for the slotted tee. It has never been produced and never existed. The custom of the shop. The fact that the workmen were furnished such sketches and drawings to work from. The fact that the workman would require the dimensions all indicate some sketch or drawing was made. Mr. Bole testifies he made the sketch of the single-piece key that the workman used. Mr. Rydgren testifies he had a sketch. [Tr. 689.]

Mr. Knapp, called by defendants and employed as foreman of defendants' shop, says:

"Mr. Wilson took me over to the side of the shop near a post where this reamer 120 was standing and explained to me that he was going to try a 1-piece key in this reamer. And at that time he took a pencil and drew on the palm of his hand a sketch of this key." [Tr. p. 201.]

"Q. Did Mr. E. C. Wilson at any time give you a sketch of a single-piece key that was to be made and used in reconstructing this reamer 120 otherwise than as the rough indication of it on his hand?

A. Not that I remember of." [Tr. p. 224.]

Mr. Knapp testifies that it was "possibly a day, not more than that" after Mr. Wilson made this sketch on his hand before work was started on remaking reamer 120. [Tr. p. 120.]

E. C. Wilson testifies that he dictated the shop order (6904) for remodeling this reamer 120 either the same day or next day following this conference with Mr. Bole, Mr. Willard, Mr. Wilcox and Mr. W. W. Wilson. The sketch for the tee formed a part of such shop order. It is significant of the utter unreliability of his testimony, and doubtless so impressed the trial court, that this shop order does not in any manner refer to this key. The shop order reads:

> "Change 8" reamer 120, as follows:
> Anneal same & remill to standard
> size 8" cutters.
> Bore out a hole for spring to 4"
> diameter.
> Make special 7/16"x3/4"x18" spring.
> Put in bottom bolt.
> Equip with extra heavy slotted T
> of new type, same to be made of
> nickel steel." [Tr. p. 805.]

This order specifically refers to every detail of change to be made in the reamer *except it is absolutely silent as to any key or single-piece key.* The sketch for the "extra heavy slotted T of new type" is shown on page 803 of the transcript and numbered 7056. ("A subdivision of the original order," E. C. Wilson [Tr. p. 94.].) This most elaborate system of shop orders, time and workman's slips, and shop records

show conclusively that the sketch from which and the order upon which the first single-piece key were made have not been produced. If this conclusion be incorrect,—then there is only one other:—That when shop order 6904 was made out, this invention was not intended to be placed or incorporated in the remodeled reamer and Mr. Wilson's testimony is mythical and not in accord with the shop records,—the practice of the shop, or his careful and pains-taking method of keeping records, and the incorporation of a single-piece key in this reamer was an afterthought,—after the making up of this order,—again impeaching E. C. Wilson's testimony and showing in all probability the single-piece key was first tried out in some other reamer than #120, *or the entire proposition as to the making and trial of the 1-piece key were left to Mr. Bole* and in making out shop order #6904 Mr. Wilson was only endeavoring to produce his "heavier and stronger" slotted tee; if Mr. Bole succeeded with the single-piece key that could be used. If not the old 2-piece key could be used. Doubtless as Bole suggested the one-piece key, it was left to him. He so testifies. Does not such testimony ring true in the light of the directions of shop order #6904? Neither Mr. Knapp nor any other of the workmen even pretends he has any recollection as to these facts of the remodeling of reamer 120 *except as shown by the time slips and shop orders.*

No explanation has ever been offered by Mr. E. C. Wilson of the total silence of shop order 6904 as to this particular key invention which was according to

his testimony the impelling motive for remodeling reamer #120.

How far reaching is this impeachment (of Mr. E. C. Wilson's testimony that he originated the one-piece key idea and explained it to Mr. Bole), by the silence of shop order 6904, is emphasized by Mr. E. C. Wilson's testimony, corroborated by the testimony of his brother W. W. Wilson that they together worked out the proportions of the new or "heavier" slotted tee several days before this pretended or claimed explanation by E. C. Wilson to Mr. Willard, Mr. Bole, Mr. W. W. Wilson and Mr. E. C. Wilcox. Yet no mention of the single-piece key was made to the brother, W. W. Wilson, when so discussing the changes in the tee and the rebuilding of the reamer. Yet this is the story of E. C. Wilson and W. W. Wilson would have the court believe. The shop order 6904 logically follows and logically shows what E. C. Wilson was striving to do. It by silence proves that the single-piece key was the creation of Mr. Bole and at the date of E. C. Wilson's making out such order was not in E. C. Wilson's mind as a part of the changes to be made. Does not this silent witness most persuasively tell us that the single-piece key was Mr. Bole's idea and left (as Mr. Bole says) for Mr. Bole to make and demonstrate?

Another striking example of the contradictory character of the testimony of Mr. E. C. Wilson,—another impeachment of the reliability of his memory and another demonstration of the utter lack of dependence that can be placed on his recollection or testimony is the story in regard to the discovery by the workman

Houriet that this single-piece key could be removed from the reamer by simply driving a cape chisel or the tang end of a file under one end of the key and driving the key out from the other end of the key slot.

E. C. Wilson had told two totally different stories in regard to this mythical discovery and as we shall show there was an impelling reason for the remarkable switch in his testimony.

At first he testified that he did not know when this man Houriet made this discovery; that it was sometime after February 27, 1911; that he could not tell how long. It would merely be a guess on his part. [Tr. 161.] Then he states they first removed this key from reamer 120 by means of a lever. Asked as to his best recollection how long they used such lever before Houriet made this discovery he says:

"I should say it had been two or three weeks."

Asked if the lever might have been used for four weeks prior to Houriet's alleged discovery he says: "I couldn't say as to that." [Tr. p. 163.]

Examined by the trial court after the testimony had been announced as closed by the attorneys, Mr. Wilson changes his testimony to:

> "That was just at the time the reamer was first completed so it could be assembled; it was some time in the latter part of February, 1911; it was about the middle of February, I should judge, 1911." [Tr. 699.]

In this connection it should be noted that this change by Mr. Wilson in his testimony was made after he

had heard the testimony of Mr. Houriet, Mr. Bole and complainants' witness Harry Naphas and in an evident attempt to make his testimony agree with that of Mr. Houriet. It was also to avoid the fact established by documentary evidence that this manner of removing the key was well known to E. C. Wilson and others prior to February 28, 1911. The letter to J. A. Kibele [Tr. pp. 153, 154], written, dated and mailed February 28, 1911, conclusively proves that Mr. Wilson's memory was exceedingly bad when he said [Tr. p. 163] it was after February 27, 1911, and he "should say two or three weeks" after that before Houriet discovered this key could be so removed by driving the end of a chisel or file under one end. Perhaps this palpable change of his testimony and the demeanor of the defendant E. C. Wilson on the witness stand when so interrogated by the court and he so changed his testimony, was a large factor in the court's concluding his testimony was not to be relied upon.

There is a sharp conflict between the testimony of E. C. Wilson as to this discovery of the removal of this key by a chisel or the tang end of a file and the testimony of Mr. Bole and of complainants' witness Harry Naphas that Mr. Bole made this known to E. C. Wilson and showed Mr. Wilson that the key could be so removed. The trial court heard these witnesses, observed them on the stand and believed that Mr. Bole and Mr. Naphas testified truthfully. Their testimony agrees with the E. C. Wilson letter of February 28, 1911, to J. A. Kibele.

It is also significant that Mr. Knapp did not cor-

roborate Mr. E. C. Wilson's story that Knapp called Wilson's attention to this mythical discovery of Houriet's and had E. C. Wilson come out into the shop with Knapp to see how the key could be so removed. Mr. Knapp testified in the case. He was still in Mr. Wilson's employ and we have a right to expect his testimony would be as favorable to Wilson's story as possible.

Mr. Houriet testified. He says it was about the middle of February, 1911, he accidentally drove a cape chisel in and saw it raise the key up and he drove the key right out. [Tr. pp. 475, 476.] After looking over the shop slips he says it was later than February 22, 1911. [Tr. 477.] His cross-examination demonstrates conclusively he has no recollection either of the work done or the dates except as these appear on the time slips. He makes a positive misstatement of the work he did. He is contradicted and impeached as to such work by the sketch of the slotted tee [Tr. p. 803], and by the testimony of the foreman Knapp. He is impeached and contradicted by the testimony he gave in the Patent Office Interference. The change of Mr. Houriet's testimony in an effort to meet the documentary proof that this method of removing the key was known prior to February 28, 1911, is shown by reference to Mr. Houriet's former deposition.

"Q. You gave a deposition in the interference in the Patent Office in relation to this matter?

A. I think so.

Q. You were asked in that deposition the following question and gave the following answer:

'Q. 31. What did you put under it to raise it up? A. Well, just—anything that I remember that I used— I couldn't get it out very handy, and there was a file there and I drove the file in and that raised it up, and I drove it out the other way. Q. 32. How did you drive it out? A. With a hammer. Of course, the handle of the file is tapered, and by raising up the key I could drive it out.' You gave that testimony, did you? A. Yes, sir.

Q. You were asked this question on cross-examination, were you? 'XQ. 50. I suppose, Mr. Houriet, that it was after you had completed this reamer and had it assembled that you, as you say, discovered that you could remove this single-piece key from it by driving the tang end of a file under the key. Is that correct? A. No, sir. XQ. 51. When was it? A. Before that, when I was experimenting with it trying to get the key out. XQ. 52. What was the condition of the underreamer at that time? A. I had just been working on it and experimenting with that key to get it in and out. XQ. 53. And on how many different days and different times had you been experimenting in getting the key in and out prior to that time? A. That I couldn't say. It must have been a couple of days. I couldn't say just positively. It has been too long ago. But I know I worked on it.' That is a correct statement of your testimony? A. Yes, sir.

Q. That agrees with your recollection of the facts at the time of giving such deposition on September 29, 1914? A. I think it was; yes, sir.

Q. You were asked this question on cross-examination, were you? 'XQ. 61. According to

your recollection when was it that you did that last work on that reamer and made this discovery, as you say, that you could remove the key by driving in the tang end of a file? A. I couldn't tell; it has been too long ago.' That was your testimony at that time? A. Yes, sir.

Q. And that was true according to your recollection at that time of giving that testimony? A. Yes; it was as near as I can remember.

Q. You were also asked this question: 'XQ. 62. Have you any recollection whatever of the day of the month? A. No, I have not. XQ. 63. Can you tell me whether it was in January, February or March or April? A. It has been too long; I have lost recollection of that. I know the work I did.' Did you give that testimony? A. Yes, sir.

Q. You were asked this question on cross-examination: 'XQ. 81. Will you state positively that Mr. Knapp delivered that key to you? A. Well, I wouldn't say positively, because he may have told the man that forged it to give it to me as soon as he was through with it, but it was the same thing as him giving it to me. XQ. 82. You have no distinct recollection as to who it was that gave you the key at that time, have you? A. No; I couldn't say positively. XQ. 83. Have you any recollection as to who it was that forged that key? A. Yes. I can't think of his last name, though. It was a fellow that worked there. We always called him Fred Ricker, or something like that.' Is that a correct statement of your testimony given at that time? A. Yes, sir.

Q. 'XQ. 91. How many times did you have to try to get this key out of that reamer before you discovered that you could get it out by simply

driving in the tang end of a file, as you say? A. I worked at it two or three hours trying to get it out, and possibly longer than that. XQ. 92. In how many different days? A. That I couldn't say.' That is a correct statement of your testimony? A. Yes, sir." [Tr. pp. 481-484.]

Conclusively it is shown that he had no recollection whatever of what work he did on reamer 120 or when he did it. When recalled by the court [Tr. pp. 691-693] and asked if he ever showed or demonstrated to any one that the key could so be removed, he says he does not remember any one in particular except Mr. Knapp.

(Questioned by the court):

"Q. You don't remember of showing it to anybody except Mr. Knapp that you could do it that way?

A. Yes, I remember showing it to other people that come there.

Q. Well, who?

A. I can't remember their names; I didn't know them; I didn't know them by name; he would call me over to go demonstrate the reamer, to take it apart." [Tr. p. 693.]

There can be no pretense that Mr. Houriet did not know Mr. E. C. Wilson. Yet we find that there is no testimony of any one to corroborate E. C. Wilson's testimony that Mr. Knapp told him (Wilson) that Houriet had made this discovery and took Wilson out to see how Houriet was removing the key. This story then rests on Mr. E. C. Wilson's own word. Knapp

does not corroborate him. Knapp does not testify he ever even told E. C. Wilson of this alleged discovery of Houriet's. Neither does Mr. Houriet. Both E. C. Wilson and W. W. Wilson were in the court room in plain sight of Mr. Houriet while he was testifying. Yet he cannot remember ever having shown either of them that this key could be removed in this manner.

We have heretofore pointed out the remarkable discrepancy between the testimony of the various witnesses on behalf of the defendants in regard to the circumstances under which they respectively testified they became familiar with the facts to which they testified. We have seen that while Mr. E. C. Wilson, in order to impress the court with his importance and the importance of the part he played in the origination of this invention has repeatedly testified that he called Mr. Willard, Mr. Bole, Mr. W. W. Wilson, Mr. Wilcox and perhaps Mr. Knapp into conference with him in regard to this single-piece key invention that each and every one of the witnesses deny this and deny that Mr. E. C. Wilson ever requested their presence at any such conversation. We have, however, another singular thing in connection with this claim that Mr. Houriet discovered how to remove the single-piece key from the reamer with the tang end of a file or cape chisel. It is to be noted that neither Mr. Houriet nor Mr. E. C. Wilson make any pretense that the brother, W. W. Wilson, was a party to such discovery in any manner. Neither E. C. Wilson nor Mr. Knapp testified or claimed that Mr. W. W. Wilson knew anything whatever of such discovery. Mr. Houriet does not

remember ever having shown W. W. Wilson how such key could be so removed. There is not a shadow of an assertion by either Mr. Houriet, Mr. E. C. Wilson or Mr. Knapp (the only other parties who are supposed, according to the theory of defendants' case, to have known of this alleged discovery by Houriet) that the brother, W. W. Wilson, was in any manner a party to the disclosure of this discovery by Houriet to any one. In this connection it must be remembered that Mr. Knapp does not testify that he called E. C. Wilson's attention to this discovery, nor does he in any manner mention the brother, W. W. Wilson, in this connection. It is natural, however, that we should find the brother, W. W. Wilson, stretching his imagination in his attempts to corroborate the various assertions made in the testimony of Mr. E. C. Wilson. Unfortunately, however, Mr. W. W. Wilson stretches his imagination too far. He inserts himself into occurrences which, according to the testimony of the other of the defendants' witnesses, occurred without his knowledge. Perhaps this fact is one which was considered by the trial court in rejecting the testimony on behalf of the defendants. Perhaps the manner in which W. W. Wilson appeared on the stand and his demeanor influenced the court in its conclusion. It is significant that W. W. Wilson testifies in this regard as follows:

> "I was sitting in the office one day and Mr. Knapp came into the office and got myself and Mr. E. C. Wilson and told us to come out into the shop and look at that reamer. He said we

didn't need a lever to pry it out. So we went out into the shop, and Mr. Houriet, who was working on the underreamer, had found that—and he did at that time put the underreamer together, and then, with the tang of a file, drove it under one edge of the key and pried it up. He was then unable to pull the file out and leave that key with the prong sticking up on the edge or corner of the bore; and then he was able to drive the key out the other side. That is the way he dismantled the reamer at that time." [Tr. p. 280.]

On cross-examination W. W. Wilson testifies:

"Q. Please tell us again when it was that this man Houriet made that discovery.

A. It was very shortly after the underreamer was assembled the first time. That is, I think—I don't believe I saw him assemble that or disassemble it the first time or so. It was only two or three or four days, or something like that, after the underreamer was completed, or ready to assemble the first time, that we were called out to that conference. That is the first I knew about it.

Q. According to your present recollection, when would that have made the date of such occurrence? A. The early part of March, 1911." [Tr. p. 295.]

It is to be remembered that Mr. Houriet testified [Tr. p. 475] that he had been trying to get the key in and out and he had tried prying it out but had found that he *"couldn't get it out that way"* and then he accidentally drove a cape chisel in and saw it raise the key up and that he could drive it right out. "I worked at it two or three hours trying to get it out,

and possibly longer than that." [Tr. p. 484.] He couldn't say on how many different days he had tried to get the key out by prying it. [Tr. p. 484.] Reading, however, the testimony of Mr. Houriet when recalled and questioned by the court [Tr. pp. 691 to 693], Mr. Houriet asserts that he should judge he put in and took out the key two or three times by means of the cape chisel before he called Mr. Knapp's attention to it, and leaves, as the result of his testimony in response to the court's questions, the impression at least that he never succeeded in removing the key in any other manner. Yet E. C. Wilson has testified that the key was removed *by means of a lever for two or three weeks before Mr. Houriet made this discovery.*

It is therefore apparent that the testimony of W. W. Wilson in regard to this occurrence is not to be relied upon. Is it not significant that no one of the other witnesses mentioned W. W. Wilson as having any knowledge of this alleged discovery? In this connection it is to be borne in mind that when giving his deposition in 1914 in the interference in the Patent Office W. W. Wilson says that this reamer #120 "*was probably first assembled in the early part of March,* from my inspection of the time cards, but I am not able to definitely settle this point." [Tr. p. 292.] This testimony again shows that W. W. Wilson, like the other workmen in the shop, has no definite recollection of any of these facts other than as they are shown by the shop records, and that he is testifying from deduction and not from memory when he departs from the shop records.

To say the least W. W. Wilson's testimony in regard to this alleged Houriet discovery is a most remarkable piece of testimony to be considered as corroboration. Complainants submit that on the contrary it is illustrative of the contradictory and conflicting character of the evidence on behalf of the defendants. It is passing strange that if W. W. Wilson was a party to the explanation of this discovery by Mr. Houriet to Mr. E. C. Wilson, that neither Mr. E. C. Wilson nor Mr. Knapp nor Mr. Houriet remembered W. W. Wilson as having anything to do with the matter or as having been present. It is to be considered in this connection that when the trial court recalled Mr. E. C. Wilson and questioned him in regard to this occurrence and gave him several opportunities to state who was present when he, E. C. Wilson, was shown by Mr. Houriet how to remove this key in the manner referred to, Mr. E. C. Wilson fails utterly to name any one except Mr. Houriet who was present, yet it is to be remembered that this testimony was taken in open court; that Mr. E. C. Wilson had heard this testimony given by his brother, W. W. Wilson, and that he knew the purpose of the court was to compare the testimony on this point. Mr. E. C. Wilson knew the court had just questioned Mr. Houriet and Mr. Bole before calling him. It is significant that, in response to the questions asked by the court, he would not on oath assert that his brother, W. W. Wilson, was present. These things and the manner in which they occurred all doubtless had their effect upon the conclusion reached by the court, and it is absolutely impossible to

reproduce for the benefit of this appellate court on this appeal the situation of the witnesses and the attendant circumstances of the giving of their testimony so that this court will be in as good a position to judge the credibility of the witnesses as was the trial court.

So far we have been considering solely the conflicting testimony of defendants' own witnesses and various impeachment of such several witnesses not only by each other but by the conflicting statements made by them in the trial of this case and in their Patent Office depositions. No attempt has been made by complainants to exhaust these conflicts, but only sufficient thereof are brought forward to illustrate the doubtful and conflicting character of the testimony. The direct conflict of testimony does not stop with the defendants' witnesses. Their testimony is in direct conflict with that of the witnesses produced by complainants. A striking example is in regard to who first removed the key with the tang end of a file. We have just analyzed the Houriet story. Let us consider the conflict of testimony on this point. Mr. Bole testifies:

> "I remember it was the morning when the first key was fitted. Mr. Houriet was fitting up the key and attempting to put the key in the reamer while I was fixing a tool to get it out. And I went over —there was a couple of horses or trestles there and this reamer was laying crosswise on it—flat. And Mr. Houriet had a light hammer and had the key and was attempting to drive it in. And I said, 'Let me do that, Al.' And I took the hammer and I couldn't drive it in. The taper was so abrupt and the spring had so much tension on it that

every time you would hit it would fly out. And I said 'We will hit it with a sledge-hammer,' and I hit it with a sledge-hammer and the first crack brought it over this hump and it went in place. After this time Mr. Wilson came along; he had not been there that morning.

Q. You mean Mr. E. C. Wilson?

A. I mean Mr. E. C. Wilson. When he came up he looked at it, and I said, 'Well, it is in place.' He said, 'Yes; you have got it in. Now, let me see you take it out.' And I had ground up this tool—I have ground it up this morning, something similar to it. I ground up a tool like that which was made out of a file. I broke half of the file off and ground this end, and by driving that under this point it raised that up to a position where this was.

The Court: You have it wrong side up.

A. No. The reamer was lying on the side. By driving it in this position it raised this point up until it came out of the bore of the reamer, and then by turning the reamer over and hitting it on the opposite side, we could drive the key out.

Q. (By Mr. Lyon): And I understand you, at that time the reamer was lying on its side?

A. Yes, sir; lying on its side, on a couple of trestles.

Q. Was there anyone else present besides Mr. E. C. Wilson at that time? A. Yes, there was—

The Court: Besides who?

Mr. Lyon: Mr. E. C. Wilson.

A. Mr. Houriet was there and I believe Mr. Wilcox was there. I am quite positive Mr. Wilcox was there, and Mr. Naphas, my pump foreman.

Q. You heard the testimony of Mr. Houriet

that after this reamer 120 was completed he discovered, after some experimentation, that he could remove this single-piece key therefrom by driving a cape chisel under such key. Do you know anything about any such discovery by Mr. Houriet?

A. No, sir. If he did anything like that he did it after I had taken this key out in the first place, and I don't believe it could be done with a cape chisel, anyway, without chipping the bottom of this business here. This would have to be ground. And that is the first key they say they made, and it doesn't show any marks of chipping.

Q. Now, you have seen this diagram of the key which has been drawn at the bottom of 'Defendants' Exhibit Wilson Reamer Key and Tee Sketch of 1911.' Did you ever see a key like that in any Wilson underreamer?

A. I never saw a key like that. The first key did not have these notches in the bottom." [Tr. p. 512.]

When recalled by the court, in answer to the questions of the court Mr. Bole testifies as follows:

"The Court: Who was present when you first used a file to get this key out of the reamer 120?

A. Mr. Wilcox, I believe, was present; he was around there; there was quite a few men around the shop backwards and forwards; they were all more or less interested in it, and Mr. Naphas was there.

Q. Well, to whom did you first call attention to the fact that you could get it out with a file?

A. Mr. Houriet.

Q. Mr. Houriet?

A. Mr. Houriet was right there. As I say,

he attempted to drive the key in; that was the first time it was attempted to put a single-piece key in the reamer, and he was driving it in when I had gone to grind up this file to get it out, and the light hammer he had in his hand would not put the key in; the tension of the spring would cause it to rebound, to come out, it wouldn't go under the spring, and we used a sledge, and Mr. Houriet was there when we did that; I drove the key in with the sledge; I had tried it or he had tried it with a light hammer in the first place, and then I took the light hammer and I couldn't put it in, and then we took the sledge and the sledge drove it in, and that was on account of the steep taper, and then he was right there after it got through and I took this file that I had ground out and took the key out.

Q. Had you removed this key with any other instrument but a file prior to that time? A. No, sir.

Q. Had you attempted to pry it out with one of these things with a hook on the end of it?

A. No, sir; when the key was finished and ready to be pried out the first thing I did was to take one of these old files that was used around for filing up plungers; I broke it in two and took the temper out of the end so that when you hit it with the hammer the steel wouldn't fly; I held it under the wheel until it got cherry red, got a temper on it, and then I took and ground the other end like this tool I had yesterday, and that was the tool I used and that was the first tool used.

Q. When was that?

A. That was about the middle of February, 1913, as near as I can remember.

Q. 1911, you mean?

A. 1911; I am not positive, exactly.

Q. Well, the first time you called Mr. Wilson's attention to it you say Mr. Naphas was present?

A. Yes, sir, that was—Mr. Wilson had not come down from his house yet that morning; he wasn't there when we tried—when we put the key in. Just as we got the key in and I had driven it out—I am pretty sure I had driven it out once or taken it out once, and we put it back and Mr. Wilson came along, and Mr. Wilson said in sort of a sarcastic manner, 'Well,' he says, 'you have got it in; now let's see you get it out.'

Q. And you say Naphas was there?

A. Naphas was there.

Q. At that time? A. At that time.

Q. Now, when was this?

A. This was about the middle of February, 1911.

Q. Well, that was the first time you had ever taken it out with a file?

A. Yes, sir; the first time it was ever taken out at all.

Q. Was Mr. Houriet there?

A. Yes, sir.

Q. Did the key have those offsets in the lower end of it, each end, those little nicks in it as indicated in the drawing here?

A. Heavy brown paper drawing?

Q. Yes, sir.

A. No, sir, it didn't.

Q. Didn't have those in it?

A. Didn't have those in it. The corner was broken or tapered, but it didn't have these notches in it.

Q. Those notches were not in the key that you took out?

A. No, sir, I know they were not; if they were ever in that key they were put in there afterwards.

Q. Now, as I understand, Mr. Naphas didn't testify in this interference proceeding?

A. No, sir.

Q. Why didn't you have him testify in these proceedings?

A. Well, Mr. Lyon said that it was not necessary. I asked him if he wanted me to go and get Mr. Naphas and he said it was not necessary; he said we had the case won; he said there was not anything to do as he could see, and he said we didn't need him." [Tr. pp. 694-697.]

Harry Naphas, called on behalf of complainants, testifies he was foreman of the pump department at the defendants' shop, that the first he saw of such single-piece key device for underreamers was some time in February, 1911. He says:

"Q. (By Mr. Lyon): When did you see the first of such single-piece key devices?

A. Some time in February, 1911.

Q. Where? A. At Wilson & Willard's.

Q. Under what circumstances?

A. Well, the circumstances, the first I seen was they were having a dispute on the key and I at that time was foreman of the Bole Pump Company and went over to ask Mr. Bole something about some pumps we were building, and Mr. Bole was standing there and Mr. Wilson came down the shop, and they were trying to get the key out—Mr. Bole was—I wasn't—and Mr. Wilson says, 'You have got it in; now let us see you get it out.'

Q. Give us the rest of the conversation and state what was done at that time.

A. Mr. Bole took an old file, something similar to this, which I used to file my plungers with, and drove it in and started to wedge it, and it started to come, and I walked away. And that is all I—

Q. Who was the Mr. Wilson that you say was there at that time?

A. Mr. Wilson sitting right there.

Q. You mean E. C. Wilson?

A. E. C. Wilson, not Web. [Tr. p. 693.]

Q. When was it you saw Mr. Bole attempt to put the end of a file under this single-piece key in a reamer? A. In the morning—one morning.

Q. What morning was it?

A. It was on a morning about the middle of February, or maybe a little later, of 1911.

Q. How much later than the 15th of February?

A. I couldn't say exactly as to the day.

Q. Had you ever seen that key in that reamer before? A. No, sir.

Q. Do you know who put that key in the reamer?

A. No, sir.

Q. You didn't see the end of the file go in under the key, did you? A. Yes, sir.

Q. What happened to the key then?

A. The key started to wedge itself out.

Q. Did it move out as well as lift up?

A. Yes, sir; it gradually lifted up, and then I seen Mr. Bole take a hammer and then hit it, and then it started to move out and up at the same time.

Q. It moved up and out when he hit it. And you didn't go away before he hit it?

A. Yes, sir; after he hit it I walked away.

Q. You didn't see the key come out?

A. No, sir. [Tr. 615.]

Q. And you are sure Mr. Wilson was there?

A. Yes, sir.

Q. Nothing was said?

A. No, sir. Mr. Wilson came up and said, 'You have got it in; now how are you going to get it out?' or words to that effect.

Q. And you didn't know whether Mr. Houriet or anybody else around the shop had driven a file or chisel in there before, do you?

A. No, sir. [Tr. 616.]

Q. (By the Court): Was the file that was driven in there changed in any way, or was it a natural file? A. It was a file just similar to this one.

Q. It had been changed a little bit?

A. Well, it had been changed. It was an old, broken file.

Q. Well, had the end of it been changed?

A. Yes, sir.

Q. How?

A. Just simply similar to this here, so he could start it underneath the key. Otherwise, you couldn't get the file in there if it was blunt. So it was sharpened on the end.

Q. Since that date to whom have you told what you saw there? A. From now?

Q. From the time you saw and heard what occurred there about getting that key out, up until yesterday, did you tell anybody about it?

A. No, sir; I haven't seen nobody. I haven't

seen one of the boys at the shop that I worked with or anybody to speak anything about it. In fact, I didn't know anything about it.

Q. Now, who all were there at the time this occurred?

A. Mr. Bole and I were there, and Mr. Wilson came down in the shop in the morning, and Mr. Bole had the key in there and I went up and Mr. Wilson came down and said, 'Now, how are you going to get it out?'

Q. Nobody else there present?

A. No, sir. He was standing looking at it with the key in there.

Q. This is the first time you ever testified about it?

A. Yes, sir.

Q. You never gave any evidence before about it to anybody?

A. No, sir." [Tr. 619-620.]

As thus seen there is the very sharpest conflict between the testimony of Mr. E. C. Wilson and Mr. Houriet, on one side, and Mr. Bole and Mr. Naphas on the other as to this first use of the tang end of a file to remove the key. Who told the truth? It is apparent that the trial court believed Mr. Bole and Mr. Naphas. The trial judge questioned each of the witnesses on this point. He heard their testimony. Can this court say that as a matter of law the trial judge was unquestionably in error as to which story is the truth?

The fact that Mr. E. C. Wilson is forced by the production of the Kibele letter of February 28, 1911, to change his testimony and place the time of Mr.

Houriet's alleged accidental discovery prior to the date of that letter instead of "two or three weeks" after they had been using a lever to pry the key out, is a strong reason why the Houriet story should not be believed. If the Houriet story is not believed, defendants' case utterly falls, as the credibility of the testimony of Mr. E. C. Wilson is totally gone, and it is upon his testimony, alone and uncorroborated, that defendants rely to show that E. C. Wilson conceived the invention and explained it to Mr. Bole. Defendants have only Mr. Wilson's testimony that the sketch shown at the conference of February 3, 1911, was made by E. C. Wilson. And yet upon such a record defendants ask this court to reverse the findings of fact of the trial court.

Mr. A. G. Willard was the owner of half of the stock of the defendant corporation at the time of remodeling reamer 120. At the time of giving his testimony E. C. Wilson was indebted to him in a considerable sum for the purchase of his stock in the defendant company. They had been the closest of business associates for years. He is produced as a witness on behalf of defendants, who thus vouch for him. We may rightly expect that his testimony would be colored in favor of defendants and of his own interest to protect his debtor. He testifies that he first saw "a drawing or sketch of this Wilson reamer one-piece key" in January or February, 1911, but says he does not know who made it or produced it or by whom it was shown to him. [Tr. p. 456.] He testifies that he does not remember who first mentioned such single-

piece key to him. [Tr. 301.] It is significant that defendants do not examine Mr. Willard as to the alleged February 3, 1911, conference. He was in a position to have known. Defendants produce him as a witness, but carefully refrain from questioning him in regard to such alleged conference. Possibly this was in order to keep complainants from cross-examining him before the court as to such alleged facts. His deposition in the Patent Office Interference is not testimony in this case. It was used and can only be used for the purpose of showing the differences in his testimony then and now and now as testimony in chief to support defendants' main case, in lieu of a direct examination. This was the ruling of the trial court in sustaining defendants' objection to complainants' attempted cross-examination [Tr. 303.]

Mr. Willard was a competent and necessary witness for defendants to have produced. The presumption, if they had failed to produce him, would have been that he would not have corroborated the testimony of E. C. Wilson. Should not the fact that defendants produced him on the stand and then carefully refrained from examining him as to the material parts of Mr. E. C. Wilson's story and objected to complainants interrogating him, and securing the ruling that such questions by complainants would not be cross-examination, raise even a stronger presumption against the truth of defendants' case? The burden of proof was on the defendants, and the truth from Mr. Willard would have thrown light upon the controversy. He was in a position to have known whether Mr. E. C. Wilson was

telling the truth. Defendants vouched for him. Why were they afraid to examine him?

The conflict in the testimony does not stop with the particular instances to which we have heretofore called attention. With the exception of the Houriet story and the testimony on behalf of complainants conflicting and contradicting it, we have considered only instances of conflict between the testimony of the defendants' own witnesses. Complainants introduced testimony which is totally at variance with and contradicts and impeaches the whole of Mr. E. C. Wilson's story that he was the originator of this invention or that he explained the same as his invention to either Mr. Bole or any one else. The trial court heard the testimony of all these witnesses and saw their demeanor on the stand and questioned them and found that Mr. Bole was the inventor and entitled to the patent. It is clear, therefore, that the trial judge was satisfied with the truth of complainants' evidence. It is conclusively shown by such evidence that in September, 1908, the defendants were manufacturing and selling the "Wilson" underreamer almost identically as shown in the drawings of the Wilson patent, "Complainants' Exhibit B." [Tr. pp. 739, 740.] The only difference between the showing of these drawings and such reamer as then manufactured being that in place of using "dowel-pins," indicated at 8 in the drawings, defendants had substituted machine screws. Defendants still used the block 7 which was insertible into the bore of the body of the reamer to form a shoulder or seat for the coiled spring 6, thereby forming the sus-

pending means or means for mounting and holding the spring, spring-actuated rod and bits or cutters in the reamer.

About the middle of September, 1908, Mr. Bole received an offer through Mr. Roy L. Heber, the general foreman of the Sunset Monarch Oil Company, as foreman of the machine shop of that company at Maricopa, California. Mr. Bole left Los Angeles to take that position, at least temporarily, until Mr. Heber could secure a satisfactory man. When Mr. Bole arrived, on either September 17th or 18th, he found that Mr. Segur, the vice-president of the company, had arrived from San Francisco the same day with another man by the name of Converse to fill the position as foreman of the shop. As Mr. Bole did not wish to "cause any friction between the general foreman and the manager," he asked Mr. Heber to give him an order for some tools and pay his expenses and to give his brother-in-law a position with the company and call it square on that basis. He secured the position for his brother-in-law, his expenses, and an order for a 9⅝-inch reamer, two sets of reamer cutters and an order for a 10-inch Bole spear. Mr. Heber was not desirous of ordering a Wilson reamer. He stated that they had had so much trouble with the Wilson reamer that they did not want to use it any more. In order to overcome these objections Mr. Bole explained the invention in issue in this suit to him. Mr. Bole says:

> "I showed him how I could make this key and put it in this reamer, and explained to him how it would overcome this difficulty he had had of his

pins freezing and having had to drill them out. And he gave me an order on the strength of my recommendation.

I drew out on a piece of paper a sketch of this key to show him; showed him how it could be put into the reamer, how it could be taken out; showed him all about it as I had desired to make it, had wanted to make it.

Well, I told him that by putting this slot in and leaving space enough to get the key in it could be driven right in from the side of the reamer and when they got it in there the projection at the bottom would snap down into the bore of the reamer, and the tension of the spring would hold it in place, and it could be taken out by simply driving a drift at one end and prying it up at the lower edge of the opening and it could be driven out from the opposite side.

Q. When you say 'driving a drift,' what do you mean by 'drift'?

A. A drift or punch; anything pointed that would fit in under there." [Tr. pp. 491, 492.]

Mr. Bole made out the order for this reamer, the extra cutters and the spear and mailed it to Mr. A. G. Willard, Mr. E. C. Wilson's partner, in the Wilson & Willard Manufacturing Company, at Los Angeles. This order was in letter form and is thus explained by Mr. Bole.

"I wrote this letter to Mr. Willard, and, as I went along in the letter, I made little descriptions or drawings, as was a custom of mine. I didn't send any drawing of it—any separate drawing accompanying it. The description was not among the written matter. As I went along in the letter

I described how I wanted this made, and I told him to start to work on the body of the reamer, and they wanted it to be shipped up immediately, as soon as it was completed, and that when I got back to Los Angeles, as the key was the last thing fitted to a reamer, that we could finish up the job and put this key in and send it up there, and I would explain to him more fully how I wanted it, but to start in and make the reamer body itself." [Tr. p. 493.]

Mr. Bole made and there was offered in evidence as "Complainants' Exhibit F" [Tr. pp. 509-10] a reproduction of the drawings and sketches which accompanied this order from Mr. Bole in September, 1908, to the defendants. This sketch or drawing is reproduced on page 751 of the transcript.

A postal card, "Complainants' Exhibit D" [Tr. 746], is produced and offered in evidence, showing that on September 19, 1908, Mr. Bole was at Coalinga, California, having left Maricopa. This postal card agrees with the time sheets of the Wilson & Willard Manufacturing Company, which show that Bole was absent from the shop of that company from September 12th to and including September 20th, 1908.

Mr. Heber fully corroborates Mr. Bole in regard to Mr. Bole having come up about the middle of September, 1908, to take charge of Sunset-Monarch shop, and in regard to the conversation with reference to the objections which the Sunset-Monarch had with the Wilson reamer, the explanation of this invention to Mr. Heber by Mr. Bole at that time, September 16th,

17th or 18th, 1908, and the order then given. Mr. Heber testifies as follows:

> "I complained about the Wilson underreamer giving trouble with the pins. The pins had to be drilled out, which was bothersome. That was the block and screw type. I talked that over with Mr. Bole and he said he could improve it if I would give him an order; that he would guarantee to send an underreamer that would not give trouble, and I gave him an order for the underreamer and for a 10-inch casing spear. We sat down in the shop and I asked Mr. Bole what kind of an improvement he had in mind which would avoid the troubles we had had with the pins which held the block in place, and he sketched a key while sitting in the shop, and said that that would give satisfaction and that we would not have any trouble with the underreamer fitted with this key. The key was an ordinary gib-key and the underreamer was to be provided with a slotted mandrel or tee bar, the body of the underreamer having a slot through which the key could be pushed into place to seat in the central bore of the underreamer, and the tee bar or mandrel could work up and down on this key by reason of the slot in the tee bar. The spring which surrounded the mandrel or tee bar would bear on the top of the key. The wing or projection of the key sticking down into the bore of the underreamer so that the shoulders at each end of the wing would hold the key from sliding out. The tension spring bearing on the top of the key would hold the key in place, the upper end of the spring bearing against a nut on the end of the slotted tee or mandrel. This key, Mr. Bole said, could be readily removed by simply

prying up one end and driving the key out. Mr. Bole made a sketch of the key at that time when he was giving me this explanation. My recollection is that that sketch was made on a piece of paper with a lead pencil.

Q. 26. Do you know what became of this sketch?

A. I do not. I don't think it was kept.

Q. 27. Could you reproduce for us such sketch?

A. I don't know whether I can give an exact drawing of it, but I will give you the way it appears to me now. This is the way it looks to me. (Makes a sketch.)

Mr. Lyon: The sketch just made by the witness is offered in evidence and marked 'Bole's Exhibit Heber Sketch.'" [Tr. pp. 716, 717.]

The deposition of Mr. Heber further shows that there was friction between Mr. Heber and Mr. Converse, Mr. Converse not being a practical oil company machinist, and that when Mr. Converse took charge of the shop he, Heber, paid no particular attention to that part of the work thereafter and therefore paid no particular attention to the filling of this order so given to Mr. Bole. Mr. Heber left the company soon after.

Mr. Bole testifies that not only did he explain this invention to Mr. Heber, as aforesaid, but that he explained it to a machinist, Gus Adams, who was employed in the Sunset-Monarch shops at the time. Mr. Adams was familiar with both the "block-and-screw" and the "two-piece-key" types of Wilson's reamer, and all that was required from Mr. Bole to Mr. Adams in explanation of this invention so that Mr. Adams would

understand it was a sketch or drawing of the shape of the key and the statement that it would be put into the slot in the reamer body in place of the old two-piece key. Mr. Adams being thoroughly familiar with the Wilson reamers and being a machinist readily understood this description of this invention.

Mr. Adams was called as a witness on behalf of the complainants and fully corroborated Mr. Bole as to this explanation of the invention. [Tr. pp. 623 to 628.]

On cross-examination Mr. Adams testifies as follows:

> "Q. You don't remember anything said at the time you made this sketch in chalk up there in Maricopa in 1908?
>
> A. He said the reason he was getting the order for the underreamer from Mr. Heber was owing to the fact he was putting a different key in it; and that is how he come to show me the key—the sketch of the key, rather.
>
> Q. Did he show you anything beside the outline of the key? A. He did not, at the time.
>
> Q. Did he state how the key was to be used?
>
> A. He told me he put it in the slot instead of the two-piece key and let the gib hold it in place.
>
> Q. Did he tell you how he proposed to get the key out?
>
> A. I think he told me he could drive a wedge under one end of it and lift it out.
>
> Q. And lift it out with the wedge? A. Yes.
>
> Q. Pry it out with the wedge? A. Yes.
>
> Q. Drive a drift under it and pry it out with a wedge? [Tr. p. 631.]

Q. Did you make any inquiry why that order was not filled?

A. Why, he told me that Mr. Wilson would not make the reamer with that key in it, for some unknown reason.

Q. When did he tell you that?

A. That was the first time I saw him afterwards, in the fall." [Tr. p. 632.]

Mr. Bole's testimony is further corroborated as to the mailing in to defendants this order for this modified reamer embodying the invention in issue. Mr. Willard, Mr. E. C. Wilson's then partner, was called as a witness to rebut the testimony of Mr. Bole. He testifies that this order was received through the mail at the shop of the Wilson & Willard Manufacturing Company; that it called for a 9⅝-inch Wilson underreamer, "and in this letter or order that I received there was some mention of some change." Defendants' counsel asked him a direct and leading question:

"Q. Did that change relate to a single-piece key for the Wilson reamer?

A. It has always been my impression that that change referred to the holding means." [Tr. p. 651.]

On cross-examination Mr. Willard gives the following testimony:

"Q. You used the term here this afternoon that it was your recollection that in this order for the Sunset-Monarch reamer, sent down by Mr. Bole in September, 1908, there was either a sketch or some description of some change to be made in the

holding means. What do you mean by 'holding means' in that answer?

The Court: I didn't understand that myself.

A. I mean by the words 'holding means' the means that help to confine the spring within the body of the reamer.

Q. (By Mr. Lyon): And hold up the—

A. Tee bar.

Q. The spring actuation—

A. Hold up the tee bar." [Tr. p. 656.]

Mr. Willard was called as a witness by the defendants. From all association with him they knew him well; they vouch for him by calling him as a witness.

A reading of the depositions given by Mr. Willard in the Patent Office Interference shows conclusively that he has made every attempt possible on his part to assist the defendants, even hiding behind the stereotype answer "I don't remember" as to most material facts. His Patent Office depositions, however, show that he testified that this order so sent down by Mr. Bole did contain some kind of a sketch of a key device for the underreamer as ordered and was for a Wilson underreamer with the slotted tee bar. [Tr. p. 364.]

It is remarkable that with the elaborate and careful system of keeping records in vogue in the shop of the defendants that this order cannot be found, and it is to be explained only on one hypothesis, and that is that the order with the suggestion of the changes was sent to Mr. E. C. Wilson at Bakersfield or given to him about October 1st, 1908, when he was in Los Angeles at the shop of the defendant corporation and assisting

his brother in the acquisition of a thorough knowledge of the records, the keeping of the records and how to keep the books of said corporation. Mr. Bole testifies that on numerous occasions between September, 1908, and February, 1911, Mr. E. C. Wilson discussed this proposed change with him.

This proof that Mr. Bole originated or conceived this invention as early as 1908 has a double aspect in this case. It has already been pointed out that there is no testimony or evidence of any kind to corroborate Mr. E. C. Wilson's claim or testimony that he originated this invention or that he made the sketch which he claims to have shown to Mr. Bole, Mr. Willard, Mr. W. W. Wilson, Mr. C. E. Wilcox and perhaps Mr. Knapp at this alleged conference which he claims to have called on February 3, 1911. Not a scintilla of record or documentary evidence is produced on behalf of the defendants to support E. C. Wilson's uncorroborated testimony. On the other hand that such explanation and such sketch may have emanated from Mr. Bole and an explanation by Mr. Bole to Mr. Wilson is clear from the testimony of Mr. C. E. Wilcox.

In judging the probabilities of this the court must necessarily, and the trial court evidently did, take into consideration this conclusive proof by the testimony of Mr. Bole, Mr. Heber and Mr. Adams that Mr. Bole had discovered or conceived this invention years before and was in full possession of it prior to this alleged conference. If the court accepted this testimony of Mr. Bole, Mr. Heber and Mr. Adams, corroborated by the testimony of Mr. Willard as before stated, then it is

easy to see why the impeached and contradicted and contradictory testimony of Mr. E. C. Wilson was not believed and why the trial court would not accept Mr. E. C. Wilson's uncorroborated testimony.

The fact that Mr. Bole well knew of this invention long prior to this alleged conference of January 3rd, 1911, is established by the testimony of Mr. Heber and Mr. Adams. On the other hand, there is only Mr. E. C. Wilson's own testimony that he went into this conference with any idea of the invention as originated by him, although we have Mr. Bole's testimony that long prior to this date he, Bole, had explained this invention to E. C. Wilson. The proven situation of the parties, E. C. Wilson and Bole, and the established fact that Bole had full knowledge of the invention prior to 1911 must be an extreme factor in arriving at a finding as to the true situation of the parties at such alleged conference. The utter contradiction and impeachment of E. C. Wilson's testimony and the utter unreliability of it is thus clear.

We have heretofore pointed out the fact that although E. C. Wilson testifies he gave his original sketch to Mr. Knapp, the foreman, as a part of shop order 6904 for the remodeling of reamer 120 Mr. Knapp denies this.

Mr. Bole is asked [Tr. 499] whether he knows anything about how it happened that the defendants took up the manufacture of a reamer, or the making over of a reamer, embodying this single-piece key invention, and in answer testifies:

"Mr. Wilson had been having considerable trouble with the reamer he was using, at that time—that is, 'up to that time,' I mean about the 1st of January, up to the 1st of January, 1911. The sales had been falling off in different fields, and he was having considerable trouble with the reamers. That is, the reamer block and screw type he was using. And he said to me one day there, he says, 'I don't understand why it is that they have so much trouble with this reamer.' I said to him, 'Why don't you make that reamer that I designed for the Sunset-Monarch Oil Company, the one that was ordered by the Sunset-Monarch Oil Company?' He says, 'It seems to me Mr. Willard and I had some correspondence about that, didn't we?' I said, 'You certainly did.' He said, 'What was that like?' And I had to explain it to him again. He had forgotten all about those conversations, I suppose. At any rate, he asked me to explain it to him again. And I got down on the floor and with a piece of chalk showed him how I could make this one-piece key and put it in the reamer and take it out. And he said, 'The trouble with that tee bar is it is weakly constructed,' and I said, 'You can strengthen that by increasing the size of it and flattening out the spring to accommodate it.' At that time they were using the round springs; the material they were made of was round material. By flattening it out he could get more space to put in a heavier tee bar." [Tr. p. 500.]

"He said that he didn't believe it could be taken out. And I argued with him, and this matter was taken up on several different occasions. I took it up with him and tried to convince him, and he said it would have to be pried out; and I

told him, at the time, a drift could be driven in under the key, and it be raised on one side and the key driven out from the other side. It was a simple proposition on the face of it, to my notion. There is hardly any other way to take it out." [Tr. p. 502.]

Asked whether he knows anything at all in regard to a single-piece key device having been built and made and installed in any underreamer at that time, Mr. Bole testifies that he does and says:

"This key was made up under my instructions. I made out a sketch which was attached to the original shop order. I think that went through the pump department; at any rate, the key was built under my instructions. I did some work on it myself in filing and fitting, and I remember distinctly driving the key in place the first time it was put in the reamer. The key at that time, it was uncertain what taper to put on it to drive under the spring. I remember distinctly that this drawing of mine had on this taper 'See Bob for the taper,' with my name on it at that time." [Tr. p. 511.]

The defendants were the keepers of all of the original records in regard to these transactions and it is most clearly proven that they had a most elaborate system of keeping all such sketches including all the original sketches and drawings. It is significant in this case that although the foreman, Mr. Knapp, denies that he received any sketch whatever from Mr. Wilson of this single-piece key and does not testify that he, Mr. Knapp, made any such sketch. The workman,

Fritz Rydgren, who made the first single-piece key, testifies that he made the single-piece key *from a sketch and that it was necessary for him to have such sketch to make it from.* Mr. Rydgren testifies:

> "There was no reamer key made by me until I got the sketch from some one, I don't know who gave me the sketch, but there was a rough pencil sketch on a piece of wrapping paper handed to me." [Tr. p. 688.]
>
> "Q. (By Mr. Blakeslee): From whom did you obtain such sketch?
>
> A. I don't remember who gave me the sketch." [Tr. p. 689.]
>
> "Now, in making up those keys and forging them, you had to have some directions in the beginning as to the size of the key and the wing on it, and so forth, didn't you? A. Yes." [Tr. p. 690.]
>
> "Q. And that was the purpose of this sketch?
>
> A. That was the purpose of the sketch." [Tr. p. 691.]

Mr. Bole's testimony that this first single-piece key was made up under his instructions and that he made out a sketch which was attached to the original shop order finds further corroboration in the testimony of complainants' witness, Harry Naphas. Mr. Naphas was asked if he ever saw the one-piece key itself before he saw Mr. Bole prying it out with the end of a file in the presence of Mr. E. C. Wilson. He stated:

> "The first I seen that was when Mr. Wills handed it over to Robert E. Bole at his desk.
>
> Q. What did Mr. Wills do with this single-piece key at that time?

A. He gave it to Mr. Bole. That is, he didn't give it to him; he laid it on my desk like that, and he simply picked it up." [Tr. p. 614.]

Mr. Bole, after testifying that this first single-piece key was made under his instructions, testifies [Tr. p. 514] that the first single-piece key made did not have the notches in the bottom like the tracing of the key on Defendants' "Exhibit Wilson Reamer Key and Tee Sketch of 1911." [Reproduced transcript p. 814, such notches being marked with an arrow and T.] Mr. Bole also testifies that this first single-piece key that he had made and that he tried out and with which he showed E. C. Wilson that he was correct as to the feasibility of removing by driving a sharp edge like the tang end of a file under, so far as he knew was not the one that was actually used in the underreamer after the experimental stage had passed. He says he does not believe it was; that the key was "too weak." That the single-piece key that he had made was made of a size to be and was inserted in the slot which had been made for the old two-piece key and such slot was narrower than was required for a single-piece key. [Tr. pp. 514, 515.] Mr. Bole testifies in regard to this first single-piece key as follows:

"Well, it was made to fit the old slot that was in the old reamer, because it was an uncertain quantity. They had not tried it out yet, *and it was only to be made up to be tried out.* The heaviest thickness in that one-piece key would be the same size as the slot that was in the reamer. That slot was made to fit a two-piece key in. In

other words, this key to go into the same space as the two-piece key would be weaker, and this key was afterwards made stronger." [Tr. p. 514.]

This testimony is in accordance with ordinary human experience in the building of new devices. It would be most unusual for the first device to have been perfect or to have been exactly as desired or to have been made with a view to actual commercial use. It also finds corroboration in the fact that shop order 6904 as dictated by Mr. Wilson is totally silent as to any kind of a "holding means" or single-piece key. The very fact that shop order 6904 is silent and makes no mention whatever of such holding means is record and documentary corroboration of Mr. Bole's testimony.

Mr. Bole is enabled to fix the fact definitely that he had conversations with Mr. E. C. Wilson and explained this invention to him prior to the 27th day of January, 1911, by the fact that Mr. Wilson was insisting a single-piece key could not be removed by driving the tang end of a file or the end of a narrow chisel, like a cape chisel, under the key but that on the contrary it would be necessary to pry such key up, and by the fact that on January 27, 1911, he made a sketch of a lever for this purpose of prying the key up and had it witnessed by two men working in the shop. As Mr. Bole explained in his testimony his purpose of making this sketch was simply to produce a means of overcoming Mr. E. C. Wilson's objection that Bole's suggested manner of lifting the key and driving it out was impractical. The sketch that Mr. Bole

made at that time shows the single-piece key. It is important, however, in this case as a memorandum made at the time and by which Mr. Bole is enabled to fix the date. It must have been before this date that this matter was discussed. The sketch is in evidence as "Complainants' Exhibit E" and is reproduced on page 749 of the transcript of record. This is the sketch or drawing referred to by the trial court in announcing its decision in this case. It is apparent that the trial court after hearing of the witnesses was satisfied beyond doubt as to the genuineness of this sketch and that it was made at the time it is dated, to-wit, January 27, 1911, and was witnessed at Mr. Bole's request by both Mr. Fahnestock and Mr. Grigsby. Mr. Fahnestock and Mr. Grigsby were in the employ of the defendant corporation. At the time of the trial in this case Mr. Fahnestock was still in the employ of the defendant corporation. Both of these men were called by the defendants in an attempt to deny the genuineness of this sketch. Both admit the genuineness of their signatures on the sketch and the most that either of them will say in favor of defendants is that they do not remember that they signed the sketch. An example of this is the answer of Mr. Fahnestock on cross-examination [Tr. 675], as follows:

> "Q. Did you attempt at any time to deny that this was your signature on this Complainants' Exhibit "E"?
>
> A. No, I don't know as I have attempted to deny that that was my signature."

Mr. Bole testifies to the making of this sketch and that Mr. Fahnestock and Mr. Grigsby on January 27,

1911, at his request signed it as witnesses. The sketch is admitted to contain the genuine signature of Mr. Fahnestock and Mr. Grigsby. In other words, both of these men admit their signatures. Here is a written document. It contains the admitted signatures of two witnesses. Both of these witnesses admit the signatures are genuine. Is not the burden of proof upon him who would dispute the genuineness of the instrument? Is not the burden of proof upon him to prove any assertion that there had been any change or alteration of the document after the signature of the witnesses? Complainants submit that the production of this written instrument in evidence bearing the genuine signatures of the witnesses at the bottom and the production of the witnesses by the defendants and their admission that their signatures are genuine proves the genuineness of the instrument. It is only upon hypercritical grounds that the sketch can be questioned. Mr. Bole gives us in his testimony a full explanation of its making. Defendants urge that it is passing strange that Mr. Bole should have had a sketch witnessed of simply this key removing device and not a sketch of the key invention itself. It must be remembered that the key invention was produced by Mr. Bole in September, 1908, and a full explanation of it and a full drawing of it sent to the defendant corporation. At that time Mr. Willard, Mr. E. C. Wilson and Mr. Bole were most friendly. On cross-examination Mr. Bole is asked why it was if he thought this key invention was of such importance that he did not perpetuate the idea by some sketch, back in 1908, and Mr. Bole answers:

"Mr. Blakeslee, I thought that was all a matter of record. It is the custom of the Wilson & Willard Manufacturing Company to file the letters and orders in the envelope with the time cards all the way through, and it is the shop custom when you get anything in an order for any new thing, that it is on record. At least that is the general impression around the shop, that if you get anything on a shop order and in the files, that it is a record, and I didn't believe that anybody would ever lay any claim to that but myself." [Tr. pp. 526-7.]

This controversy was one essentially for a trial in open court with a full opportunity to the trial court to see the witnesses, observe them in their demeanor on the stand and to himself ask questions of the witnesses. There is another subordinate issue of fact which was raised upon the trial and which doubtless had a very material influence upon the trial judge's judgment of the witnesses and their testimony. An attempt was made by the defendants to prove their second defense, i. e., that Mr. Bole as a part of the settlement on February 1, 1913, of the Bole Pump Company's business withdrew and waived all claim or right of the invention in issue as a part of such settlement. It was in connection with this contention that the total unreliability of the memory of W. W. Wilson was so glaringly shown and his entire testimony impeached. He testified that such settlement was not in writing and that there was no written contract of settlement. The written instrument was produced and he was forced to admit that he had signed it as a witness. An attempt

was made at the trial of this case to alter, change, modify and vary the terms of this settlement by showing a contemporaneous oral agreement providing other terms, to-wit, a waiver of this invention or the grant of a license to use this invention by Mr. Bole as a part of such contract. The trial court properly excluded this testimony. No exception was reserved by defendants to this ruling of the court as required by equity rule 46 and no request was made of the court to "take or report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence," etc. The ruling of the court, in rejecting this evidence is not before this court for review.

It will be found that the court did admit the testimony of E. C. Wilson, W. W. Wilson and R. E. Bole as to the conversation had at the time of this settlement for the purpose of ascertaining whether what was said at that time indicated in any manner who was the originator or inventor of this invention. In this connection it is again important to remember that although A. G. Willard is shown to have been one of the persons present and was called as a witness in this case on behalf of the defendants he was not interrogated as to that conversation. There was sharp conflict and contradiction between the testimony of E. C. Wilson and Robert E. Bole and the testimony of W. W. Wilson and R. E. Bole. The trial court after hearing this testimony apparently believed Mr. Bole.

At the time of this settlement defendants had brought suit against Mr. Bole and had attached all his physical property. On page 776 of the transcript is printed

a copy of Mr. Bole's letter of January 17, 1913, to Mr. E. C. Wilson as president of the defendant corporation. The character of this letter was certainly such as to bring home most forcibly to Mr. Wilson and the defendant corporation the necessity of including in writing every settlement that was made between the parties and should have placed the defendant corporation and Mr. E. C. Wilson on guard at the time of making such settlement with Mr. Bole. We believe that the trial court received the right impression from this Bole letter of January 17, 1911. The trial court says:

> "The letter that Bole wrote to Wilson, when he got into a controversy with him, is, it seems to me, the most natural thing in the world for him to do, in that he makes claim that he will not let Wilson use the invention any longer, or words to that effect. I think it was a very unnatural and unusual thing for Mr. Wilson to do,—if he claimed to be the inventor of that key,—to make a settlement with Bole, without including in that settlement the controversy concerning the key. It was very unbusinesslike and very unnatural."

In this connection it is to be remembered that Mr. Bole testifies that he, Bole, flatly refused to include this invention in that settlement or to give defendants this invention and this testimony on the part of Mr. Bole is born out by his subsequent act in making the application for the patent in suit in less than two weeks after this settlement contract was executed. It is inconceivable that the defendants would have settled and compromised their claim against Mr. Bole and

released the attachments covering all his physical property without the inclusion of this invention in such settlement had they at that time even thought of making a claim that Mr. E. C. Wilson was the inventor. In fact, the testimony of both E. C. Wilson and W. W. Wilson as to this alleged conversation is susceptible of only one conclusion and that is that all of the parties to such conversation considered this invention the invention of Robert E. Bole. None of them say that Mr. Bole said he would admit that Mr. Wilson was the inventor.

Clearly the defendants have not sustained the burden of proving the origination of this invention by E. C. Wilson beyond reasonable doubt. On the contrary the trial court was correct in its judgment that the evidence "thoroughly convinced" without "the slightest doubt" that Mr. Bole was the inventor.

The appellants' 10th assignment of error is that the district court erred in receiving in evidence the deposition of Roy L. Heber. The defendants admitted at the trial that they had received due and sufficient notice of the taking of Mr. Heber's deposition and that the ground given in such notice for taking such deposition was that the "said Roy L. Heber is about to leave the southern district of California and the state of California and probably will not return thereto at any time prior to the 23d day of March, 1915, the date upon which the final hearing for trial of the above entitled suit is set, and this deposition will be taken to preserve the testimony of said witness on behalf of the complainants in said suit."

The objection that was made to the reading of this deposition in evidence was that the deposition was not taken in accordance with rule 47 of the new equity rules inasmuch as this case had been at issue more than ninety days prior to the taking of such deposition.

Mr. Heber's deposition was taken by virtue of and in accordance with section 863 of the revised statutes of the United States and it was shown by the notice given and by the testimony of the witness that Mr. Heber was about to leave the jurisdiction of the trial court and to depart to a place beyond the reach of the subpoena and over one hundred miles to the place where the trial of this suit was to take place so that under section 863 as Mr. Heber was "about to go out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial," the absolute right to preserve his testimony in deposition form was given to complainants by this section of the statute.

During the running of the time limited by rule 47 for taking depositions, (under commission before an examiner or other officer named by the court), there was no cause or reason for taking the deposition of Mr. Heber. He was at that time, as his evidence shows, residing within the southern district of California and had no then intention of removing therefrom.

Complainants insist that they had the absolute legal right to take Mr. Heber's deposition at the time and in the manner in which it was taken and as it was conceded at the trial that Mr. Heber was still outside of the southern district of California, to-wit, in the

eastern district of Illinois, complainants had a right to read the deposition in evidence.

The right to take the deposition under these circumstances is given by R. S. U. S., section 863, and is an absolute right. It is to be borne in mind in this connection that it is this same statute which gives to the Supreme Court the right to make the rules in equity and that the power thus granted by this statute to make such equity rules is restricted to modes "which are not inconsistent with any law of the United States." If therefore new equity rule 47 could be construed as intended to limit absolutely the right of a party to take a deposition for whatever cause to the time therein set or to the manner therein set such rule would be in controversion of this statute and unconstitutional, void and migatory. But it is not necessary to so hold. New equity rule 54 particularly and specifically recognizes the right to the parties to take depositions as provided by section 863. No attempt is made by equity rule 54 to limit the time. There are several reasons why rule 54 is silent as to the time within which such depositions may be taken and this particular case at bar illustrates most clearly the reason why such rule is so silent as to time. The exigency for the taking of Mr. Heber's deposition did not arise until after the case had been at issue for a longer time than referred to in rule 47. It has always been held that no order of the court was required to put into effect section 863 and that the right of the party to take the deposition of the witness thereunder was an absolute right when any one of the conditions precedent of the statute was pre-

sented as in this case. Mr. Heber was about to go out of the district in which this case had been pending. The taking of his deposition fell directly within the provision of this section of the statute and the statute was self-executory. This has been recognized by the Circuit Court of Appeal of the Second circuit in

*In re National Equipment Company,* 195 Fed. 488, 489, in which, speaking for the court, Circuit Judge Lacombe says:

> "This rule apparently and the order heretofore made do not apply to testimony which may be taken *de bene esse* under section 863, U. S. revised statutes (U. S. Comp. St. 1901, p. 661), where the witness lives at a greater distance than 100 miles from the place of trial, or is about to go out of the United States, or is ancient or infirm, etc. It would not be within the power of the district court or of any judge to deprive a party of the rights accorded to him by that section. Indeed, the rules of the Supreme Court in reference to the mode of proof in causes of equity must be construed so as not to conflict with the provisions of that section, for the power of that court to prescribe modes of taking evidence in suits of equity is restricted to modes which are 'not inconsistent with any law of the United States.' Sections 862, 917, U. S. Rev. Stat. (U. S. Comp. St. 1901, . ., 661, 684.)

See also

*Stegner v. Blake,* 36 Fed. 183;
*Arnold v. Cheseborough,* 35 Fed. 16

As said by Circuit Judge Lacombe, in Henning v. Boyle, 112 Fed. 397:

> "The method of taking testimony by commission is cumbersome and unsatisfactory, and not resorted to when the convenient method of taking proof prescribed by section 863, Rev. S. U. S., is available. That section provides for the case of a witness who lives at a greater distance than 100 miles from the place of trial. *No order or direction of the court is required antecedent to such examination. The right to take it upon notice merely, in the manner prescribed, is given absolutely to the party by act of Congress.* If question is to be raised as to the reasonableness of the notice, or as to the regularity of the proceedings, it may be raised by motion to suppress."

Defendants' objection to the reading in evidence of Mr. Heber's deposition was properly overruled by the court for the further reason that defendants had not proceeded in accordance with the established practice to suppress the deposition. It was too late at the final hearing to object to the deposition or to object to it being read in evidence. If defendants wished to test the right to take this deposition defendants' appropriate action was by a motion to suppress the deposition. Defendants had full notice and knowledge of the taking of the deposition and under equity rule 55 the deposition was published and notice thereby given to defendants thereof on the date upon which it was filed, which was February 13, 1915. At the trial defendants acknowledged actual notice of its publication, Had defendants moved to suppress this deposition the court

in its discretion would have had full power to have ordered that complainants be granted a given time within which to retake the deposition, if it held that the procedure had been erroneous. By such motion to suppress complainants would have been put on notice and then would have had an opportunity to have brought Mr. Heber from Illinois to testify in open court,—if Mr. Heber had been willing to come. It is obvious that neither the court nor complainants nor defendants could have compelled Mr. Heber to have come from Illinois to testify but if such a motion to suppress had been made in time by defendants and had been sustained, complainants would not have been put in the position of being compelled absolutely to go to trial without Mr. Heber's testimony.

It has long been the rule in equity that where depositions were taken and filed out of time but no motion to suppress was made that the depositions would be considered.

See Mathews v. Spangenberg, 19 Fed. 823.

On this subject Mr. Walker, in his treatise on Patents (4th Ed.), section 639, page 495, says:

> "Depositions taken out of proper time will be considered on the hearing, unless there is a prior successful motion to suppress them."

Mr. Robinson, in his work on Patents, vol. 3, sec. 1128, page 472, says:

> "Evidence taken after the appointed time will be considered unless a motion to suppress is presented."

Mr. Street, in his work, Federal Equity Practice, vol. 2, page 1097, says:

"§ 1824. The mere making of an objection to a deposition or part of it is often sufficient to admonish the other party of the existence of the defect pointed out by the exception; and he will thus avail himself of an early opportunity to cure the defect, if he considers it to be material. If, however, he chooses not to do this, it is necessary for the party who wishes to insist upon the objection to make a motion in due course for the suppression of the deposition or the objectionable part of it. If the defect is such as not to have been available as a ground of exception before the filing of the deposition in court, then the motion to suppress can be made at once without any previous objection or exception having been taken. The purpose of the motion to suppress is to get rid of the deposition and thus prevent the party in whose behalf it was taken from reading it at the hearing."

"§ 1825. A motion to suppress a deposition for irregularity should be made as soon as practicable after notice of the defect. Upon filing and publication of testimony, a party is chargeable with knowledge of irregularities apparent in a deposition, and the motion should normally follow immediately thereafter.

"But a motion to suppress or strike a deposition is apparently not too late if made before the taking of testimony has been closed and the cause set for hearing, *because until that time the other party may have the opportunity afforded him of retaking such deposition.* There is no case in which a motion to strike out a deposition made before the cause was set for hearing was denied on the

ground of laches or delay. In every case in which the motion was denied on the ground of delay the cause had been set down for hearing."

"§ 1818. We now come to consider the mode in which and the time at which objections can be taken to informalities, irregularities, or other defects, in the taking of a deposition. The general rule is, first, that the party who wishes to complain of any irregularity must make an objection at the time when the irregularity occurs or as soon thereafter as it is practicable for him to do so; and, secondly, that he must subsequently follow up this objection by a motion to suppress the deposition or so much of it as may be subject to the objection."

The admission by the court of the Heber deposition was therefore correct for two reasons. First: Complainants had the absolute right under section 863 of the Revised Statutes under the exigency arising of Mr. Heber suddenly going out of the Southern District of California to take his deposition *de bene esse*. Second: The deposition having been taken and having been published and defendants having actual knowledge of its taking and publication are in no position to object at the trial, not having made a motion to suppress such deposition.

The 11th assignment of error is based upon an utter fallacy and misconception of the law. The judgment in an "interference" proceeding in the United States Patent Office is not *res adjudicata* even between the parties thereto, and the Wilson & Willard Manufacturing Company was not a party to such interference.

Even if such a judgment were *res adjudicata* between the parties it is not shown that any final judgment has been rendered in such interference. On the contrary, it is positively proven that the decision of the Examiner of Interferences was simply a decision of the first tribunal, and that so far as any effect in this case or any other case is concerned it was set at naught by the appeal which was pending at the time of the trial of this case. If such *decision* (*not judgment*) can be likened in any manner to a decree of a court it is clear that its effect is vacated and set aside by the appeal. It has always been held that until such a decree becomes final it cannot be pleaded as a final judgment or used for that purpose. This rule of law is ably set forth in the opinion of Judge Hanford in Bowers Co. v. New York Co., 77 Fed. 980, 983, as follows:

> "Third. A judgment or decree * * * cannot be regarded as final * * * if the cause in which such judgment or decree has been rendered has been subsequently removed into an appellate court for review, and remained undetermined and pending in the appellate court."

This is the general rule of law, and is based upon sound reason.

There is, however, another, further and even greater obstacle to the adoption of the contention of defendants in this regard. There was nothing before the court to show upon what kind of a record or upon what testimony this primary tribunal of the Patent Office (called the Examiner of Interferences) based his decision. Defendants did not offer in connection with such opin-

ion of the Examiner of Interferences a copy of the entire record to show what was before such tribunal *or to attempt to prove that the record as there made and the record as before the trial court in this case were the same.* On the contrary, it affirmatively appears in this case that additional witnesses were produced on behalf of the parties to this litigation. It affirmatively appears from the cross-examination of the witnesses that there is a material difference in the record. That the decision in such an interference proceeding is not *res adjudicata,* see

R. S. U. S., Sections 4915 and 4918;
Walker on Patents, Section 142;
Morgan v. Daniels, 153 U. S. 153;
Standard Cartridge Co. v. Peters Cartridge Co., 77 Fed. 630;
Thomas & Sons Co. v. Electric Co., 111 Fed. 929.

The reason for this rule is apparent. When the government of the United States, acting through the United States Patent Office and the Commissioner of Patents, granted, issued and delivered to complainants the patent in suit, the Patent Office lost entirely its jurisdiction over such patent. There is no provision of the statutes which gives the Commissioner of Patents any jurisdiction, authority or power to cancel or annul a patent once issued. That authority is vested in the District Court of the United States under Section 4918 of the Revised Statutes. Walker on Patents, Section 315. The sole object and purpose of the inter-

ference proceeding pending between the application of defendant, Elihu C. Wilson, and complainant, Robert E. Bole, in the United States Patent Office, is to presumptively determine whether a patent shall be issued to Mr. Wilson, and the decision of the Patent Office is not final. If the final position in such interference is against Mr. Wilson, he may, under R. S. U. S., Section 4915, by a bill in equity, litigate such refusal, and in such case he is required to make complainants and the Commissioner of Patents defendant. Such suit would be brought in the District Court of the United States before the district in which the rival inventor and his assignee reside and inhabit. In this particular case it would be in the Southern District of California, at Los Angeles.

In case the determination of the so-called interference proceedings in the Patent Office were in favor of Mr. Wilson, and a subsequent or junior patent should then be issued to him, it would still be necessary for him to bring suit in the District Court of the United States for the Southern District of California against these complainants to set aside the prior Bole patent herein sued on as an "Interfering Patent" under Section 4918, before he, Mr. Wilson, could enforce the junior patent granted to him. Likewise, if such interference proceeding in the United States Patent Office terminated in favor of Mr. Wilson, complainants could bring a suit under said Section 4918 to set aside the Wilson patent as an interfering patent. Such suit also would be brought in the District Court of the United States for the Southern District of California,

at Los Angeles, and either of these suits would be heard upon the issues framed and the testimony produced upon behalf of the parties, and the court would give its independent judgment upon the record thus made in such suit and the final judgment of the Patent Office in said interference proceeding would not be in any sense *res adjudicata* or even controlling to any degree *unless the record was the same.* It would be necessary for the party who wished to use such final judgment in the interference proceeding upon any claim that such final judgment should be followed to show that the record in the interference proceeding and the record in the court trial were the same.

The suit under section 4915 is to compel the Commissioner of Patents to grant a patent. In the case at bar the Bole patent has issued, and issued without any interference proceeding. The Patent Office hears and determines an interference proceeding upon depositions without ever seeing the witnesses. The trial court in this case observed the witnesses, asked questions of many of them and determined this case upon a different record with the testimony of witnesses whose depositions were not taken in the Patent Office interference, and has rendered its judgment *before* there has been any final determination of the interference proceeding. There was no final determination to be *res adjudicata* or controlling.

For each of these reasons the trial court was not bound by the opinion of the Examiner of Interferences. In this case the complainants entered the court with a *prima facie* case. The grant of the patent to com-

plainants raises a *prima facie* presumption that Mr. Bole was the original, first and sole inventor. The situation is entirely different from that in Morgan v. Daniels, which was a suit to compel the issuance of the patent under Section 4915 in a case where no patent had issued and no presumption had arisen by the issuance of the patent as to who was the prior inventor.

At the time this suit was brought the Bole patent had issued. It was presumptively valid. There had been no adjudication by any tribunal that Mr. Bole was not the inventor. The defendants were using the invention patented to Mr. Bole and Mr. Double, the complainants herein. To prevent such unlawful use or infringement the law gave complainants the right to bring suit to prohibit the continuance of such infringement. If they had a right to bring such suit they certainly had a right to have the court hear the case and determine it. And determine it on the issues raised by the pleadings and the testimony and proofs adduced in court. The decision of the court could not be "controlled" on these issues where no final adjudication was shown. It was utterly impossible for the trial court to determine what had been submitted to the Patent Office after this case was at issue and before its trial. There has never been a final decision of the interference.

The present suit is a suit to enjoin the infringement of a patent issued by the government. The defense is that Elihu C. Wilson and not complainant, Robert E. Bole, was the inventor. The presumption of law,

arising from the issuance of the patent in suit, is that Robert E. Bole was the inventor. That there is some other kind of a proceeding still pending undetermined involving this same issue is no defense. Defendants cannot cite any statute that takes away the right of complainants to bring, or to prosecute, or to have determined, this suit. They cannot show and have not shown any final adjudication of the issues of this suit in any kind of a tribunal. It is submitted that the court was not bound to slavishly follow the opinion of the Examiner of Interferences, nor was such opinion in any manner binding or controlling upon the court, nor was the court in any position to judge what effect, if any, should be given to such an opinion (had it been final), as the record upon which such opinion was based was not before the court. So far as such record was shown or referred to it was shown to be materially different.

In appellants' brief it is asserted in several instances that the lower court erred in its rulings excluding testimony. It will be noted from the transcript that appellants reserved no exceptions whatever to any of the rulings of the court. There was no stipulation and no order that all or any of the rulings of the court excluding testimony or overruling objections should be deemed excepted to. It is submitted that under equity rule 46 in a trial in open court it is necessary for a party to reserve his exceptions to any ruling which it is desired to review on appeal. If this is correct, no question of the ruling of the trial court in excluding

testimony or in sustaining or overruling objections to questions is properly before this court for review.

In appellants' brief the oral remarks or opinion of the trial court when ordering a decree in favor of complainants are criticised because "silent with respect to the question of anticipation" no defense of anticipation was pleaded. If by this defendants mean the use of this invention in the underreamers manufactured by defendants prior to Mr. Bole filing his application for patent, it is obvious that there was nothing for the court to say upon this contention, for the court held that he was thoroughly convinced that Mr. Bole was the inventor and had disclosed the invention to Mr. Wilson.

There is no objection to a defendant pleading inconsistent defenses. The attempt, however, to maintain or prove inconsistent defenses may destroy the entire weight of the defendants' evidence or contention. If the court found that the testimony on behalf of defendants that Mr. E. C. Wilson was the originator or inventor of this invention, or that he made the sketch which he asserts to have had in his hand at the time of the alleged conference of February, 1911, was untrue, the court was certainly justified in holding that Mr. Bole had more than proven his inventorship, and no subsequent act of the defendants in making and using the invention could anticipate Mr. Bole's invention. It is not claimed that the invention was in public use or on sale more than two years prior to Mr. Bole's application. It is clear under the issues of this case and under the testimony of Mr. Willard, Mr. E. C.

Wilson, Mr. W. W. Wilson, Mr. Bole, Mr. Naphas and the other witnesses, that either Mr. Bole was the original inventor and Mr. Wilson derived his knowledge of the invention from Mr. Bole, or that Mr. E. C. Wilson was the originator, as he claims. If truth is denied to defendants' testimony that Wilson was the inventor, as he explained the invention to Mr. Bole, then there is nothing to deny Mr. Bole's inventorship and nothing to impeach his testimony that he explained the invention to Mr. Wilson. In the final analysis this is the sole issue in this case, and it is an issue of fact.

In appellants' brief appellants go outside of the record in this case and assert that the Board of Examiners-in-Chief of the United States Patent Office have affirmed the decision of the Examiner of Interferences in the Patent Office interference. This is not a part of the record in this case and not before the court. This court is called upon to review the decision of the lower court, on the record before that court. However, with due apology to this court, complainants will depart from the record to the extent of stating, what is the fact, that such interference is still pending in the United States Patent Office on appeal and has not been finally determined. On the contrary, the Commissioner of Patents has ordered that said interference be stayed and suspended pending the decision of this court. This action was taken by the Commissioner of Patents upon the motion of complainants. Such motion was based upon a certified copy of the judgment roll in this suit, including all the pleadings, the decree, a certified copy of the trial judge's decision,

a transcript of the evidence, etc. Such motion was based upon the ground that this court having personal jurisdiction of all the parties and the issue in this case being whether Robert E. Bole or Elihu C. Wilson was the inventor, the decree in this case will be *res adjudicata* between the parties; that they will have had their full day in court on such issue and that under Section 4918 of the Revised Statutes or under Section 4915 of the Revised Statutes this court would be the court which would have jurisdiction finally of such issue and that the decree in this case finally settles this issue.

It is submitted, therefore, that the decree or order appealed from was correct and should be affirmed. That complainants have conclusively proven that Robert E. Bole was the inventor and did disclose this invention to E. C .Wilson. That defendants have utterly failed to sustain the burden of proof upon them to prove the contrary.

Respectfully submitted,

FREDERICK S. LYON,

*Of Counsel for Appellees.*

No. 2641.

IN THE

# United States

# Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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Wilson & Willard Manufacturing Company, et al.,

*Appellants,*

*vs.*

Robert E. Bole, et al.,

*Appellees.*

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## APPELLANTS' REPLY BRIEF.

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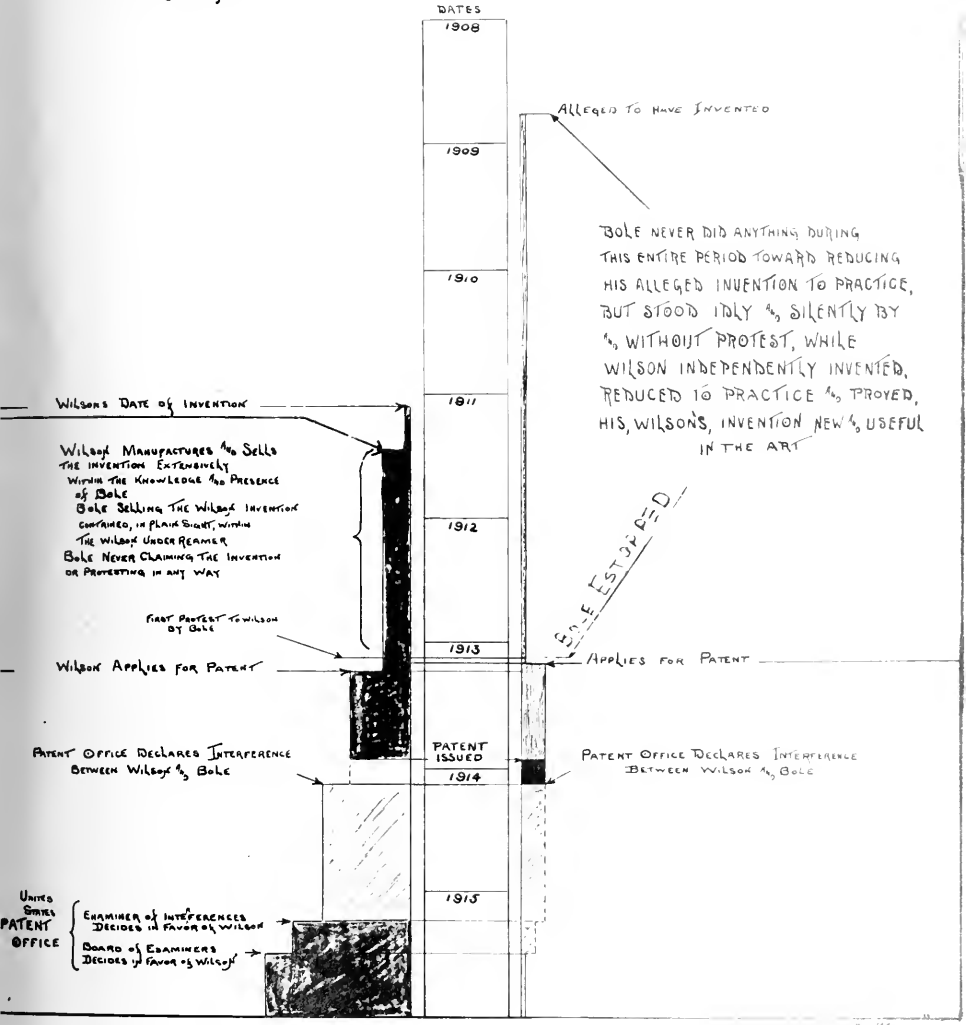
# RACE of DILIGENCE BETWEEN

## WILSON AND BOLE



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| **Wilson & Willard Manufacturing Company, et al.,** | *Appellants,* |
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## APPELLANTS' REPLY BRIEF.

In accordance with stipulation between the parties and permission accorded counsel for appellants at the conclusion of argument, this reply brief is filed more particularly to reiterate contentions of law and fact contravened by counsel for appellees in appellees' brief and on argument, and to hold up to clear daylight the many amazing distortions of fact and record showing found in appellees' brief and put forth by argument.

First: *Burdens of proof heavy upon appellees and not supported by the record on their behalf, and Bole absolutely barred by estoppel and laches.*

In spite of the contentions of counsel for appellees to the contrary, the record in this case clearly supports contention of appellants that the three issues adverse to appellees, namely, want of novelty in the Bole patent, and want of diligence with respect to priority on behalf of Bole and want of originality of invention in Bole, were all consistently and elaborately put before the trial court, backed up and supported by the authorities which have been urged upon this appellate tribunal in appellants' brief and on argument. The trial judge appeared to ignore the weight and significance of the burdens imposed upon appellees, particularly by reason of the anticipatory fact of appellants' manufacture and sale for over twenty months prior to the signing of the Bole application, and further particularly for the reason that the Patent Office has decided the interference between Bole and Wilson pertinent to the matter of originality and priority of invention of the subject of the Bole patent in suit in favor of Wilson. Under the authorities cited in appellants' brief and adverted to upon argument, this double burden of proof is upon appellees, and was upon appellees at the trial and has been upon appellees since the case was at issue, the amended bill in this case having been filed more particularly to sharpen and define the issues whereby such burdens of proof were shifted and imposed upon appellees by the proof of such anticipatory fact and by the offer and acceptance

in evidence of the records of the interference proceedings in the Patent Office.

With such burdens of proof shifted to and imposed upon appellees, it matters little what slight and immaterial discrepancies there may be in the record as between the elaborate and convincing testimony of the numerous witnesses supporting the case of appellants.

## Appellees' Proofs Are Replete With Contradiction.

*The significant and controlling feature of the controversy is that Bole is absolutely unsupported as to his alleged participation in any of the acts and performances putting into operation and effect the diligent assertive reduction to practice and manufacture by appellants in the early part of the year 1911, and, as we have previously alleged, Bole is totally unsupported by any corroboration as to his alleged disclosure of the invention to Wilson. If it cannot be found that he so disclosed the invention to Wilson, the appellants must prevail upon this appeal, inasmuch as it therefore results that Wilson was an original inventor, and further, inasmuch as it has been conclusively proved that he was the prior and diligent inventor, both in this case and in the interference proceeding, and further, inasmuch as the appellants' manufacture and sale anticipate the application of Bole by over twenty months.*

The appellees have asserted and contended that this issue depends upon facts and not upon law. We radically and insistently contend that the determination of this issue depends more upon the proper application of

the law under the doctrine of Morgan v. Daniels as to the Patent Office adjudications on the issue of originality and priority between Bole and Wilson, and upon the doctrines of law whereby the burden of proof is in a twofold manner and degree shifted to and imposed upon appellees. In view of such imposition of twofold burden of proof, the unsupported word of a discredited, contradicted and animus-actuated party like Bole can not be accepted to establish appellees' contentions, particularly in view of all the surrounding circumstances of the case; because of the estoppel operative against Bole, because of his failure to protest against appellants' manufacture and sale, over four years after the date Bole alleges as the date of his conception of the invention, and further, and because of the estoppel, consisting in his covenant to put any claim to the invention of the issue away from him forever, and particularly in no manner to harass or interfere with the business or affairs of the appellant in and about this invention. The letter of January 17, 1913, written by Bole, required no explanation by appellants. It made an absurd assertion as to rights long forfeited by Bole by his concealment and abandonment of the invention, assuming, charitably, that he ever was in possession of it. The absurd contention of counsel for appellees that the appellants had been operating under a revokable license from Bole as to the invention prior to this letter of January 17, 1913, is beneath consideration, as Bole had no patent under which to grant such license, directly or impliedly, and on the contrary,

merely acquiesced, with all the estoppel against him attaching thereto, in the use of invention by the appellants if Bole had created it.

We reiterate that this case, upon the facts, the law, and equity, coming before this court *de novo,* cannot be found to support appellees' contentions in any material or considerable extent to sustain the findings of the trial court. The whole enterprise of appellees, of whom the party Double is deeply interested in other litigation against appellants, is one of spite, presumption and harassment; and the conspiracy between Double and Bole, which latter appellee rushed to Double as soon as he had made a niggardly settlement with appellant corporation, is such a barefaced conspiracy, and is to be so plainly read between the lines and in the lines of this case, that a court of equity can or should no longer tolerate its consideration with equanimity and withhold the complementary justice and equity which the appellants seek and deserve. Appellees' counsel has made many either wilful or careless misrepresentations with respect to the record and law in this case, which require detail treatment, in order that appellees in an attempt to prevail upon this appeal by dodging the real issues of burden of proof and controlling fact and law and equity, by means of such misrepresentation coupled with immaterial assaults upon strong record for appellants, may not be permitted to ride to victory in this case upon a nightmare.

## Appellees' Desperate Tactics.

We will now proceed to point out a number of these glaring discrepancies between the presentation by counsel for appellees on brief and argument, and the facts of the record and the law cited by appellants on brief and argument. These tactics of misrepresentation, misstatement and misquotation are to be marveled at as coming from one of the standing and ability at the patent bar of counsel for appellees, upon any other presumption than that his cause was found to be one of desperation. Even in that case the marvel does not cease, for this kind of generalship is so unavailing and reactive it is hard to understand how a man of any experience at all can adopt it. In other words, if a lawyer grinds up the very dry bones of his case to make food for argument, he still is utilizing material which can be assimilated and produces such strength as may correspond to the force values in the ground-up bones; but for one to so tacitly admit that no value remained in even the bones of the case, as counsel does by his process of transubstantiation of the dry bones of the case into an entirely new anatomical creation, bearing no resemblance whatever to its alleged prototype:—this is a process of strategic alchemy which no wise general would attempt, no matter how well founded his belief in the efficacy of feint, fright and bluster. The whole procedure is one too cheap and futile to be expected to come from any practitioner before this court, were not utter desperation behind it.

First referring to the pleadings side of the case, appellees have insisted that there are only two defenses

in this case, namely, that the defendant Wilson was the inventor of the invention covered by letters patent, and that the application for letters patent by Bole was fraudulent, and that the patent in suit was therefore void; and second, that as a part of the settlement of account between Bole and the defendants, Bole withdrew and waived any claim or right of invention with respect to the subject of the patent in suit and covenanted in no way to injure or damage the defendants with relation to the said invention. Counsel says that the further defense, namely, that the Bole letters patent are invalid for want of novelty at the time Bole made his application, was not a defense urged before the lower court, and not a defense involved in the pleadings. Upon the trial we read to Your Honors that portion of paragraph 5 of the amended and substituted answer wherein it sets up these defenses, and which was filed particularly to elaborate such defenses, such paragraph including the allegation that Wilson "was using reasonable diligence in adapting and perfecting said invention, and who was, with said defendant Wilson & Willard Manufacturing Company, on his own behalf, manufacturing and selling underreamers embodying said invention at Los Angeles, county of Los Angeles, state of California, in said Southern Division of said Southern District of California, all with the knowledge of and without protest of said complainant Robert E. Bole, for a period of over one year prior to said pretended invention by said Robert E. Bole and to the filing of said application for said pretended letters patent by said Robert E. Bole"; thus

we find the defense of want of novelty clearly set up in the answer, and under the decisions in appellants' brief, such as more particularly set forth at the end of page 114, and on page 115 of appellants' opening brief, *the burden of proof was shifted to the complainants to prove by convincing preponderance of evidence that Bole's invention was still earlier than that manufacture and sale took place. This is elementary patent law and will not require extended discussion before this court, and counsel's attempt to dodge this burden of proof as well as the burden of proof imposed upon complainants under the doctrine of Morgan v. Daniels, thoroughly discussed and applied in appellants' opening brief and on argument, should not avail him. This double or twofold burden of proof reduces the case to a simple proposition heretofore urged, namely, that if Bole is not found to have proven overwhelmingly and by convincing preponderance of evidence that he disclosed the invention of the patent in suit to Wilson before Wilson came originally into possession of such invention, the appellees must lose, and as to this it was not sufficient for the lower court even to believe Bole and coincidently even to disbelieve all of Wilson's witnesses, if it did, for the circumstances surrounding the acts and relations of the parties are such as to preclude complainants from prevailing on any such unsupported testimony by Bole, by the doctrines of diligence, estoppel, concealment and laches, all treated of in appellants' opening brief. We wish to reiterate at this point our contention that although Bole can not be believed in his un-*

*supported testimony as to disclosure to Wilson before January 26, 1911, because Bole is an impeached, contradicted, animus-actuated and uncorroborated witness, even conceding, for purpose of argument, that the lower court may have felt justified in believing him, appellees must lose on this appeal because the factors of estoppel, concealment, laches and want of diligence bar Bole from any equitable or legal right in the premises. Counsel for appellees made a point on argument to the effect that Bole, prior to January 17, 1913, when he wrote the insulting and preposterous letter to Wilson, had been permitting the appellants to operate under an implied license to use the key of the invention. This contention is absurd in law and in fact, inasmuch as prior to that time Bole had never claimed to Wilson to be the inventor of that key, and furthermore had not applied for any letters patent thereon, so that there was no right or monopoly, inchoate or vested, under which he could actually or impliedly license the defendants. Upon the hearing Your Honors made inquiry as to what explanation Wilson made of this letter and counsel replied that no explanation was made. In appellants' opening brief it is pointed out on page 14, at the top, that the trial judge prevented any such explanation being made by Wilson.* No explanation was necessary, inasmuch as Wilson has testified that no such contention had been made by Bole prior to the date of that letter, and further, because of the fact that Bole's long acquiescence in the use of the key, even assuming he had any rights attaching to such key, absolutely estops Bole and both

of the appellees from the assertion of any claim as to such use or from protesting against the continuance of its use, for Bole sanctioned it by his permission if he in fact might have had any say about it whatsoever. It is shown that at the time of this statement Wilson pointed out to Bole that the letter of January 17, 1911, was the first intimation Wilson had ever dreamed of that Bole claimed any part whatever in the invention of that key. [Tr. p. 144.] If a patentee (and Bole was not then even an applicant for patent) permits with his direct knowledge, and under his very nose, the use for nearly two years of something he believes or claims he is the inventor of, and permits such user to incorporate such use into the very good will and substance of his business, the mildest application of the doctrine of estoppel will bar him from any subsequent contention that such use was unwarranted and without right. The Patent Office has so held in effect.

To return again briefly to the question of the defenses interposed in this case, and this counsel's contentions that the defenses presented to the trial court did not include the defenses of want of novelty, absurd as that contention is shown to be on the very face of the pleadings and on the very face of the record in which this question of prior manufacture and use is shown to have exhaustively been gone into. It may be illuminating to this court to read between the red ink lines of pages 67, 68, 69 and 77, Tr., which were portions of the record in the lower court ordered stricken out upon stipulation between the parties, to save ex-

pense of preparation of transcript on appeal, but which, nevertheless, found their way into the transcript. Upon these pages it is clearly seen that appellants contended and appellees realized and admitted that the question of prior use by defendants was before the trial court.

As to the Inadmissibility of the Heber Deposition

Victor Talking Machine Company v. Sonora Phonograph Corporation, 221 Fed. 676, was garbled in its meaning by appellees on argument.

Counsel for appellees stated before this court that in this cited case the motion to suppress was held to be brought too late and refused. This was not the ruling in that case at all. The perusal of appellants' opening brief, pages 23 to 26 inclusive, removes every shadow of doubt from the question of inadmissibility of the Heber deposition, the court in that eastern case holding that the defendant might have waited until the trial, and that even if laches was an answer ("which I doubt" there is none in this case). It was further held that defendant "might have waited until the trial," as appellants did in the case at bar, and the court held that it was the duty of the court on motion of the adverse party to suppress the deposition taken after the proper time, without application to the court for an order permitting such taking. We strenuously opposed the reception in evidence of this alleged deposition before the trial court, and the pages of the brief last referred to make clear the consistency of appellants in their position with respect to this deposition from the very time of notice of taking same on. It is

our contention there was no deposition taken, and that it would have been improper to give a color of sanction to the taking of such alleged deposition even by giving notice of motion to suppress before the trial. Without this Heber deposition the legendary doings in Maricopa in 1908 become reduced to the merest wraith out of the mouth of "Gus Adams" (Bole's hunting and poolroom chum) as found within the record. Rule 47, which is controlling as to this Heber alleged deposition procedure, clearly dominates rule 54, and there is no clash between these rules.

*The double burden of proof imposed upon appellees looms still larger as an impossible burden with Heber eliminated.* Even had Bole and his friends Heber and Adams had their little 1908 seance at Maricopa, that would not in any respect prove that Bole disclosed such invention to Wilson, and which Wilson stoutly denies. It is not even contended that such disclosure was until along the middle of January, 1911, and it is significant that it was in this month that Wilson has proven he got busily under way and worked out the invention in connection with his larger and stronger tee himself. Everything that Bole claims he does is tied onto the tail of Wilson's procedure. Outside of the 1908 legend Bole does not make a single independent move in his proofs. His entire case is an attempt to tag onto Wilson and to ride him into a favorable position with respect to this invention. This is strikingly evidenced by Bole's attempt to make it appear that there was an earlier thinner key made for the Wilson reamer than that made for reamer 120 by Rydgren, who says

he made all of the first keys for the Wilson reamers and that there was no such thin key among them. We have shown that Bole admitted his falsehood in such testimony, as per second paragraph, page 43, appellants' opening brief.

As to E. C. Wilson and the Agreement of Settlement with Bole of February 1, 1913.

Counsel for appellees on the hearing stated that Wilson in this case denied there was a written agreement covering such statement and was forced to admit it upon its production with his name thereon as a witness. We have endeavored in vain to find any such proofs in the record. Wilson in fact testifies [Tr. p. 144] that he dictated that very agreement. What can this court say as to this attempt to impeach Wilson by assertions not only unsupported by the record but absolutely disproven by the record?

*The reason that appellees are so desperate, as shown by these tactics, is because they realize that this court must disbelieve all of appellants' witnesses and absolutely believe each and every one of appellees' witnesses, in order to find for Bole in any particular in this case. Bole unsupported can not be believed for the reasons exhaustively pointed out, and if his witnesses are believed and he is thus bolstered up, he still cannot win on the priority side of the case, nor on novelty, because of the anticipatory fact of the applicants' manufacture; nor on the original side of the case, for nobody is brought forth to testify that they heard Bole disclose this key invention to Wilson*

*before Wilson's activity commenced. Even Naphas, who is supposed to have been present when such disclosure was made as alleged, is not asked about it. Appellees, can only hope to tear down each and every one of appellants' witnesses in order to make any kind of quasi impression upon this court. The impregnability of appellants' case is only emphasized by the methods appellees employ to attack it.* As theretofore pointed out, the defendants are men of high standing in the community as to business ability as well as intellectually (and we now, of course, refer to the brothers Wilson, the active officers and owners of the defendant corporation). No showing is made to this court that any one of appellees' witnesses is more than a wage-earning mechanic; and while we have all respect for wage-earning mechanics, it is to be borne in mind that these particular wage-earning mechanics are all either close friends and chums of Bole or a former wage-earner (in the case of Naphas) in Bole's former pump department of the defendants' business. Bole himself is a graduate mechanic, reared and helped to the front by Wilson; and the point we wish to make as to the vocations of Bole and all his witnesses is this, namely, that they are all or have been fellow-workers or chums, having every inclination to hang together in an attempt of one of their number to wreak vengeance upon his former duped creditor and employer. Such conspiracies are found in all vocations and walks of life, but the vocations of all these men being the same, and friendship aiding, it is clear to see how the Bole-Double conspiracy was worked up

and put into effect. Bole was able to lay the 1908 scene for history "manufacture" at Maricopa, where his two mechanic chums, Heber and Adams, stood ready to help him out with testimony after the alleged fact; and with Naphas on his side as a foreman in his Los Angeles business, he was able to make such attempts, feeble as they were, to show some connection with the Wilson activity in 1911. We respectfully submit this version of Bole's machinations, backed up by Wilson's competitor Double's willing co-operation, as the motif of the whole complainant performance.

A significant admission by counsel for appellees on the hearing, which is, of course, made necessary by the record, was to the effect that Wilson held the sketch Wilcox and W. W. Wilson saw at the conference of February 3, 1911, or thereabouts. *If Bole made such a sketch at that time or made that sketch, why didn't somebody see Bole with it, or see him make it? Again we put the query why Bole gave no version of this occurrence at which he says he was present, for he is proven to have been present by the unimpeached testimony of three witnesses, and his presence at that conference is circumstantially proven by the fact that it was his suggestion there made to "pry up the key" that was first adopted and found to be of no utility. and furthermore, because his alleged sketch of January 27, 1911, is of a key remover for prying up the key. Why didn't Bole at that conference disclose to Wilson the wedging up of the key and driving it out, which is what he and the Maricopa witnesses say was*

*disclosed by him in 1908? Why did Bole disclose an unadopted method of key removing if he knew of a better method and of in fact the method which Houriet had to teach the shop after this conference?* At this point let us show how counsel for appellees in his brief has garbled the record about this matter of removing the key and Houriet's connection with it, in an attempt to make it appear that Bole had something to do with removing it. *Appellees state,* page 47 of the brief:

"Mr. Houriet asserts that he should judge he put in and took out the key two or three times by means of a cape chisel before he called Mr. Knapp's attention to it, and leaves, as the result of his testimony in response to the court's questions, the impression at last that he never succeeded in removing the key in any other manner."

Now, Houriet does not testify that he removed the key at any time by means of the cape chisel. Houriet's testimony [Tr. p. 691] in this respect is as follows:

"Q. How many times did you take it out and put it in before you called Knapp's attention to it? A. Well, I should judge I took it out two or three times. At first I tried it with a chisel and then I picked up a file there, and I said, 'Anything that is tapered like that is good to take it out.'"

This is important, because this whole matter of key-removing involves Houriet's discovery of *wedging* up the key and then driving it out, which is a very different thing from *prying* it up and driving it out, which

was Bole's suggestion to Wilson and which was found to be impracticable, and the means for which purpose disclosed in Bole's Exhibit January 27, 1911, Sketch in evidence, was found to be inoperative and of inutility in court at the final hearing of this case, as pointed out on argument. This sketch is in evidence as Complainant's Exhibit E, the original of same having, as Your Honors will remember, been forwarded by the Patent Office for the consideration of this appellate court.

Proceeding further with the calling of attention to the outright inconsistency between appellees' brief and the record and facts we quote again from that brief, *page 16,* to-wit:

"It is shown that both Mr. Wilson and Mr. Bole were making sketches before any of the witnesses observed anything of this conversation or heard anything of it."

There is no such showing on the record whatsoever. The witness Wilcox testifies, [Tr. p. 248,] that Wilson had a piece of yellow paper in his hand and a pencil. This is the nearest resemblance in the record we find to any such occurrence, in that it refers to a pencil, and that only in Wilson's hand. Wilcox again testifies [Tr. p. 253] that he did not see the parties concerned doing anything at the shipping desk and they all had their backs to him. This testimony similarly contradicts the statement of the appellees' brief on *page 18,* "that both E. C. Wilson and Mr. Bole had pencils in their hands and were making a sketch." Wilcox testifies, [Tr. p. 260] that,

"I am not positive that Mr. Bole had a pencil in his hand. It is possible that he had. I will not say that he didn't have, and I will not say that he did, but I am positive that Mr. Wilson had a pencil in his hand, and he tapped the paper something like that," (illustrating).

We search in vain for any part of the record which supports the statement that Bole made any sketch whatever at this conference.

Appellees' brief likewise states, *page 19:*

"If then reliance is to be given to the testimony of the defendants' witness, Wilcox, that the sketch was made at the shipping desk, it is apparent that Mr. W. W. Wilson can know nothing as to who made the sketch."

This same testimony of Wilcox, top of page 253 of the record, absolutely refutes any such statement by counsel for appellees. If this statement of counsel is supposed to be a quotation of the testimony or of the substance of anything in the testimony, it is an untrue statement, for there is no such testimony. No witness in this case has stated that Wilson made any sketches at that desk, and certainly Wilcox does not say that any sketch was made at that shipping desk. The appellees are such carping critics of the testimony of appellants' witnesses if perchance their words reflect a variance of two or three strides in the rear of the defendants' shop, as applicable to shifting from the positions they may have assumed at one portion of the general get-together talk to another portion thereof,

that it is very interesting to note that Bole is not sure whether it was 1911 or 1913 that he performed his alleged trick of removing the key. (See appellees' brief, bottom of *page 52*, top of page 53.)

Referring again to appellees' brief, bottom of *page 57*, top of *page 58*, that Wilson is forced by the production of the Kibele letter to change his testimony and place the time of Houriet's alleged discovery prior to the date of that letter, this is not borne out by the testimony of Wilson [Tr. p. 161], and is an absurd observation anyway, inasmuch as the Kibele letter [Tr. p. 153] puts Wilson on record as having written under date of February 28, 1911, "either end can be pried up with a screw driver or coal chisel, and can be driven right out." Now, this was some twenty-five days after Bole had said this could be done at the conference, and Wilson was adopting what Bole had suggested. It may have been that day or a week or two weeks later that Houriet made his discovery, but it is evident that it was not made at that time or Wilson would have told Kibele that the key could be wedged up and pried out, which is what Houriet discovered. Wilson was simply taking the foolish and useless teaching of Bole, which was all that Bole ever taught about this key, and that concerned its use and not its production. Furthermore, the record shows that Wilson realized the key could somehow be pried up, and there was a lever in the shop which could do it and which did do it, and one of which was shipped with the first single-piece key reamer sent out. [Tr. p. 766.] Where is Wilson shown to have changed his testimony

as to this matter? This is a vital matter from appellees' standpoint, inasmuch as Bole tries to ride into this issue on the nightmare of an improper method of key-removing.

The deviousness of assertions of counsel for appellees in this case is only of a piece with that of his own witnesses, as, for instance, that of Bole himself, as quoted from bottom of *page 62*, appellees' brief, to the effect that this description was not among the written matter. That Bole in another place in his testimony said the description *was* among the written matter is a fact, as per his answer to question 40, p. 592, Tr.: "As I went along in the letter, I described the new style reamer and with each description I drew a sketch." This testimony, of course, is denied by both Willard and W. W. Wilson. Appellees state (p. 67, brief) that Bole's testimony is corroborated as to the mailing in to defendants the order for the modified reamer embodying the invention in issue, as they put it. There is no such corroborating testimony, and Adams, Bole's own witness and chum, testifies that he did not see Bole make out any order or mail it on the day that he took the reamer order at Maricopa in September, 1908, [see Tr. p. 634], as follows:

"Q. And you didn't see him send an order off for a reamer that night, did you? A. No, sir.

"Q. Didn't see him make out any? A. No, sir.

"Q. Did you talk about a reamer that evening? A. We did not.

"Q. You didn't see him make out an order at all on that day or on that trip? A. I did not."

This order was filled by a regular Wilson stock reamer, all as we have referred to in our opening brief.

Again, we state that counsel's assertion, on *page 75*, that Wilson ever insisted a single-piece key could not be removed by driving the tang end of a file under the key is made out of whole cloth. There is no such testimony in the record, and this is an untruthful statement.

Again, on *page 95* of appellees' brief it is stated that the court held and was thoroughly convinced that Mr. Bole was the inventor and had disclosed the invention to Mr. Wilson. There is no such showing in the record, and the opinion of the trial judge, quoted at length on pages 7 to 9, inclusive, appellants' opening brief, fails utterly to set forth any such holding on the part of the court. This is one of the singular aspects of the decision, namely, that, as we have pointed out in our opening brief, such strong and positive conclusions are reached upon such unsupporting bases of reasoning and finding.

Further, counsel would make it appear that the date of the invention of the issue, or at least as far as Wilson is concerned, should be found to be February 3, 1911, particularly inasmuch as he is desirous of making it out that Bole disclosed this to Wilson on or about that date. We have pointed out in our opening brief that Wilson testified he made the sketches, including the single-piece key, which sketches were disclosed to W. W. Wilson, Wilcox and Bole at the February 3rd conference, some time before that conference.

This is corroborated by W. W. Wilson, who testifies [Tr. p. 272]:

"As I remember it, I asked Mr. Wilson whether or not he would use the same kind of a key he used in the old reamer; and he said No, he was going to get one up with a single piece. He thought it would not give the trouble of wedging against the plug."

It will be seen that the date of this talk must have been on the 26th of January, 1911, when the Pacific Iron Works order for the 12½-inch tee was received. The further testimony of Willard [Tr. p. 300] and of Wilson, analyzed in appellants' opening brief, thoroughly corroborates Wilson as to his production of this invention prior to this conference of February 3rd.

Appellees' Brief, page 13:

"There is no pretense on the part of defendants that at any other time Mr. Wilson was the original inventor or that he made and used underreamers embodying the invention without Mr. Bole's knowledge."

Wilson *does claim* to be the original *inventor* prior to that time. See his testimony [Tr. p. 104]:

"The idea of the single-piece key had occurred to me on many occasions before this order was made up, namely, before February 3, 1911. As early as 1906 or seven I had devised this 2-piece key type, and in designing that type of reamer different ideas of single-piece keys had occurred to me, * * *"

See also testimony [Tr. p. 105]:

"We went over them very carefully at that time, January 26, 1911, and I then made up my mind that it

was possible to make a single-piece key which might overcome a few of the minor troubles we had had with the double-key type. * * * I made sketches of them, and thought them over and studied over them at home, and I could not determine in my own mind which was the better form of those keys to try out first in this new type of reamer."

The testimony likewise last above referred to corroborates all this.

Appellees' Brief, page 15:

"That no such conference was called and that Mr. E. C. Wilson is drawing upon his imagination that he called such a conference for such purpose is established beyond the peradventure of doubt."

We have above pointed out how conclusively it has been established as a matter of history that this conference took place. Willard has stated that there were many similar conferences or discussions and therefore it was hard for him to remember any one of them in particular. [See his testimony, Tr. p. 322.]

Appellees' Brief, page 16:

So also here again, to advert to the question of burden of proof in this case, counsel says:

"The burden of proving that E. C. Wilson made that sketch and made it as his independent conception of this invention rests upon the defendants."

We have shown beyond a shadow of doubt that legally the entire burden of proof was shifted to appellees by the anticipatory fact of Wilson's manufacture. That burden can not be shifted back to appel-

lants until it has been carried to the end of the trial by appellees. Therefore, it was not incumbent upon Wilson to make out an earlier date of invention than that of the order of February 3, 1911, but rather the burden is upon complainants to show that Bole independently invented the subject of the patent and disclosed it to Wilson before that time. This Bole has utterly failed to do, as we have previously pointed out. Even if he did, we insist that, upon the very contentions of appellees they are absolutely barred in this case by estoppel as operating against Bole.

Appellees' Brief, page 16:

"He is impeached by the testimony of his own witnesses as to the alleged calling of such conference."

A most remarkable situation has developed in this case, particularly on the argument and as shown by the general trend of appellees' brief, namely, that while appellees' counsel as an act of grasping at straws, attempts to tear to pieces the doings at the conference of February 3, 1911, while for that purpose tacity admitting that conference as an actual occurrence, the complainant Bole, testifying on his own behalf, has insisted that no such conference took place. Therefore, counsel is in effect admitting that his own witness-appellee is untruthful and in error, which is an act of automatic impeachment requiring no further comment. Bole is the only party alleged to have been present at that conference who denies that such a conference or meeting was held. All of the other witnesses, even including Willard and Knapp, either admit that there

was such a conference or general discussion or merely state their failure to recollect same. How significant it is that appellee Bole is the only person contending that there was no such conference, while we have his counsel admitting the conference by his very attempts to show that at that conference Bole disclosed the invention to Wilson. As to these matters see testimony of Willard [Tr. p. 322]. As to Bole's denial of such conference, see Tr. pp. 499 and 571. Which is the court to believe, the appellee Bole or his counsel? In other words, whose appeal is being urged, that of the appellees or the appeal on debate of their counsel?

Appellees' Brief, page 17:

"The defense rests on the impeached testimony of Mr. E. C. Wilson."

We have hereinabove in detail shown that the party Wilson's testimony is corroborated. It would be difficult to imagine any better corroboration after the considerable lapse of years than we find in this case, particularly in dealing with the question of invention.

Appellees' Brief, page 17:

"We have only the testimony of Mr. E. C. Wilson that he conceived this invention before this conversation."

The same observations apply as to this statement.

Appellees' Brief, page 19:

"The fact that he, (W. W. Wilson) testified that there was no contract in writing in settlement between the Wilson & Willard Manufacturing Company and Mr. Bole in 1913"

The testimony [Tr. p. 291] which is quoted from the interference record is to the effect that a receipt was given to Bole for payment which he made at that time. It is a matter of legal conclusion whether that receipt was a mere naked receipt or a settlement.

Appellees' Brief, page 20:

"While W. W. Wilson has the impression and attempts to state positively that his brother, E. C. Wilson, had several sketches in his hand of different shapes of keys at this time, Mr. Wilcox point-blank says there was only one that he saw." [Tr. p. 294.]

See testimony of Wilcox [Tr. p. 243], which in a measure corroborates, quite contrary to contradicting, the testimony of Wilson and his brother:

"It was only a few days after I heard little bits of conversation in regard to the letter that I saw some *sketches* of a key."

"Q. Under what circumstances did you see those sketches?

"A. Mr. E. C. Wilson and Mr. R. E. Bole and Mr. A. G. Willard were standing at a desk, used for a shipping clerk's desk."

Appellees' Brief, page 20:

"Mr. Wilcox testifies that he was not a party to the conversation at all and that after Mr. E. C. Wilson turned away from the shipping desk with the sketch in his hand and said to Mr. Bole, 'Oh, I know how to get it in there, but I don't know how to get it out,' etc."

Mr. Wilcox does not testify positively that he was not a party to that conversation. See testimony [Tr. p. 253]:

"Q. Do you now *think* that you took part in this conversation with regard to the sketch of the single-piece key? A. At that time?

"Q. Yes. A. No, sir."

This is merely another turn of phrase of appellees' counsel converting a mere doubt by Wilcox into what he wishes to make positive testimony in his favor.

Appellees' Brief, page 21:

"Mr. Wilcox says he took no part in the conversation whatever."

This is a repetition of the same erroneous construction upon the testimony of Wilcox.

Appellees' Brief, page 21:

"But there is a total failure of any testimony whatever by either Mr. Wilcox or W. W. Wilson which will deny that the sketch had been made by Mr. Bole or that will establish that the sketch had been made by E. C. Wilson."

There is strong corroboration of Wilson's testimony as to the making of this sketch in the portions above pointed out in which it is seen that Wilcox says that:

"Mr. Wilson had a piece of yellow paper in his hand, and a pencil." [Tr. p. 248.]

Certainly the burden of proof being on Bole, we must look to him (but we look in vain), for any proof that

he made any sketch at any time as to this invention and showed it to Wilson.

Appellees' Brief, page 21:

"There is a total absence of any corroboration of E. C. Wilson's claim that he made the sketch or that he explained the invention to Mr. Bole at this 'mythical conference.'"

See testimony of W. W. Wilson [Tr. p. 273]:

"And so I stepped up to the conference and saw there my brother had a sketch on one piece of paper, or several sketches on two or three pieces of paper, showing different types of keys. He was explaining that the old—He did not want to use the old two-piece key, but that he had gotten up several different designs of keys that could be used in this reamer."

This certainly is a corroboration of E. C. Wilson's testimony on this point.

Appellees' Brief, page 25:

"If he (Bole) was satisfied to permit Mr. Wilson to thoroughly try out the invention before settling with him on a royalty, he had a perfect right to do so."

We have previously pointed out that Bole is not shown to have had any invention which he could permit Wilson to use, and particularly not having any patent, he had no monopoly and therefore his permission was not necessary to be obtained.

Appellees' Brief, page 26:

"The relations were those of joint interest in the manufacture and sale of the Bole pump,"

There is nothing in this record to support any such joint interest. The entire showing is that Wilson alone was interested in the reamer matters at the shop and that Bole was simply a customer of Wilson's company in that that company manufactured his pumps for him.

Appellees' Brief, page 26:

"Mr. Bole was not in financial condition to manufacture under-reamers"

It is plain from the evidence in this case that Bole did not need to manufacture an underreamer to try out the invention, as all that was necessary for him to do was to make up a key, which was an easy and inexpensive blacksmithing job, and then try it out in one of the defendants' underreamers, which was built for the use of the two-piece key. There never was a more simple proposition in trying out an invention than that offered in this case, as it required no alteration of any of the other parts of the reamer in order to use the single-piece key in place of the two-piece key. We pointed out in our opening brief that the witness Adams stated in the repair work at Maricopa two-piece keys were made for Wilson reamers, and the making of a one-piece key was even a more simple job than the making of a two-piece key. The question of expense was not to be considered anyway.

Appellees' Brief, page 26:

"no testimony of any other person than E. C. Wilson himself, tending to show any knowledge, on the part of any of the witnesses produced on behalf of the defendants, whether Mr. E. C. Wilson was the originator

of this invention or whether he made the sketch which he is alleged to have had during this conversation of February 3, 1911,"

We have already elaborated upon the fallacy of this contention, and shown how thoroughly Wilson is corroborated by Willard and W. W. Wilson and Wilcox in these particulars.

Appellees' Brief, page 27:

"And Mr. Knapp was not there."

(at the conference of February 3, 1911.) Mr. Knapp does not testify that he was not present. He simply does not remember being present [Tr. p. 235]:

"I don't remember being present at any conference of that kind."

E. C. Wilson, W. W. Wilson and C. E. Wilcox all testify that he was present. What probably had superseded the impression of that conference in Knapp's mind was the making of the sketch by Wilson on the palm of his hand the same day or within a day or two, whereby Knapp was instructed as to making underreamer 120 and supplying the single-piece key. In other words, Knapp apparently remembers what occurred this same day about this key, but remembers the more important matter concerning the instructions he received.

Appellees' Brief, page 29:

"From his testimony on cross-examination he would have us believe that this conversation in which he says Mr. Wilcox and his brother Mr. W. W. Wilson, took

part, took place before they (E. C. Wilson, A. G. Willard and Mr. Bole) went to the shipper's desk."

Such is not the testimony [see Tr. p. 172]:

"I don't remember whether they were there at the first or not."

Also see testimony same witness [Tr. p. 171]:

"Q. Were you, Mr. Bole and Mr. A. G. Willard at that shipper's desk prior to turning to the underreamer, and prior to your making the remark with a sketch in your hand, that you saw how the single piece key could be gotten into the reamer, but did not see how it could be gotten out, or words to that effect, and Robert E. Bole spoke up and said, 'Pry it out'?

A. I think not.

Q. By Mr. Lyon: Are you prepared to state positively that you were not there?

A. I am prepared to state positively that the *first time* I said that I did not see how I could pry it out was before we went to the table, before we went to the desk."

This makes it quite clear that, as Wilson has stated, he probably made that observation several times, namely, before and after going to that shipper's desk.

Appellees' Brief, page 29:

"he says that it was in the latter part of the conference that A. G. Willard, Mr. Bole and he were at the shipper's desk and that they were not, prior to the conversation which he repeated, together at this shipping desk discussing anything or making any sketches."

As to this see Tr. pp. 168, 169, in which it will be found this witness was questioned with a limitation to *both* discussing and making sketches. He answers naturally in the negative, which is in accordance with his testimony that he made no sketches at that desk. It is evident that there may have been discussions at that desk relative to prying out the key without any sketches being made.

Appellees' Brief, page 30:

"Then he says that Mr. Willard, Mr. Bole, Mr. Knapp, and his brother, W. W. Wilson, were present when the talk started."

This is not according to the testimony, as see Tr. p. 167:

"Q. Who was present when that talk started?

A. Mr. Arthur G. Willard, Mr. Robert E. Bole, and I believe Mr. Knapp and Mr. W. W. Wilson."

It is to be noted that Wilson did not state positively that Knapp and his brother were present in the beginning. It is evident that counsel is trying to pile up inconsistencies where none exist.

Appellees' Brief, page 30:

"He does positively state that after they had been discussing the matter a little while he asked C. E. Wilcox about it."

This is another mistake of the testimony. See Tr. p. 167:

"Q. Did you invite him to take part in the conference?

A. I don't remember whether I invited him to or not. I think if I remember rightly he came up after we had been discussing the matter a little while and I asked him about it.

Q. Did he make any remark of any kind during that alleged conference?

A. I don't remember whether he did or not."

It is seen that there is no positive statement in this respect, but only a recollection, which might have been in error, and it is not a material detail anyway.

Appellees' Brief, page 30:

"He testifies, [Tr. p. 168] that he does not remember whether they were at the shipping desk before the conversation which he detailed took place."

That is not the testimony. The questions and answers are as follows:

"Q. At what time during that conference were you, A. G. Willard and Robert E. Bole at the shipper's desk?

A. Probably the latter part of the conference.

Q. Were you not there before going over to the underreamer?

A. I don't remember.

Q. Prior to the conference taking place, at which you took part, A. G. Willard took part, Robert E. Bole took part, your brother, W. W. Wilson, took part, and you think C. E. Wilcox took part, and Knapp you think was present,—prior to that conference at this underreamer were you with Robert E. Bole and A. G.

Willard at this shipping desk discussing and *making sketches?*

A. Prior to the conversation?

Q. Prior to the conversation that you have referred to."

A. No, sir."

This testimony is not one of doubtful memory, but is positive to the effect that Wilson was not at that desk prior to that time, discussing and making sketches. As seen above, Wilson admits that he may have been at the shipping desk prior to these conversations. The point is that Wilson insists he made no sketches at the shipping desk at that conversation. His testimony is consistently that he had these sketches when he came to the conferences, as above pointed out.

Appellees' Brief, page 30:

"Then again in the next breath he states positively that he was not at the shipper's desk prior to such conversation."

The same observations and testimony apply here. This is a wilful misrepresentation of Wilson's testimony, and Wilson only stated he was not discussing and *making sketches at the shipper's desk prior to such conversations.* Counsel clearly garbles the testimony to construct another piece of distorted evidence. See also Wilson testimony [Tr. p. 171]:

"I am prepared to state positively that the *first* time I said that I did not see how I could pry it out was before we went to the table, before we went to the desk."

Again we reiterate that it is evident that Wilson made the prying out remark before and after going to the desk and may have made it a number of times.

All of this line of testimony thoroughly contradicts counsel's contentions that the testimony of Wilson and of W. W. Wilson and Wilcox is not consistent in regard to the time when this prying out conversation took place, namely, whether before or after Wilson, Bole and Willard went to the shipper's desk. This prying out remark was doubtless repeated a considerable number of times, as that question of removing the key was one of the vital topics of the conversation. Wilson had completed the invention of this key and several other forms and was simply getting the expressions of his shop people as to the relative merits thereof and as to how this particular key could be removed when once in place, or as to possibly trying out one or more of such keys in reamer 120. He tried out this single-piece key and found it so satisfactory that he never had to try out any of the others.

Appellees' Brief, page 31:

"And this discrepancy exists in regard to every fact save and except that Mr. E. C. Wilson admitted after there had been this conversation that he did not know how to get the key out."

We contend that there are no essential discrepancies. The point is that Wilson had one or more sketches at that time and that Wilcox and W. W. Wilson saw them and there was a discussion about prying out the key, and that is all that is necessary to be proven to support

appellants' contentions of disclosure with sketches at that date, including disclosure to Bole. We have shown that W. W. Wilson testifies that Wilson was explaining different designs of keys and that he, Wilson, had been working on those designs of keys prior to the conference. [Tr. pp. 273 and 293.]

Appellees' Brief, page 31:

"Is it not a fair inference to draw that if any such conversation ever took place, the sketch which Mr. Wilson held in his hand at that time was a sketch which Mr. Bole had made?"

What is there to support any such inference? No one testified that he saw Bole make any such sketch, or that he had any such sketch at this time, and Bole *denies that he was present at any such conference.* At no place in the record does Bole testify that he ever furnished any sketch for Mr. Wilson. If Bole had been explaining that sketch instead of Wilson, Bole would have had it in his hand and would have been the man to have been seen by Wilcox with the pencil in his hand. On the other hand, Wilcox states that Wilson had the sketch in his hand and had the pencil in his hand. Wilson has proved that he had been working on that and other designs of keys for several days prior to that, and Bole at no place in the record makes any contention of having worked on any key design prior to that time excepting in 1908, the January 27, 1911, sketch being for a key-remover and not for a key design. There is the hole in the case through which all of the substance of Bole's conten-

tions must leak out, namely, that at this very time when the key matter was uppermost in the shop Bole made no contentions in the one piece of evidence he produced pertinent to such period, that he was claiming anything pertinent to the key, this alleged sketch showing that he was claiming a useless key-remover. Certainly no sane man would make a sketch to perpetuate the one thing of two which had no value if he could lay claim to the other of the two things which was the thing essentially of value.

Appellees' Brief, page 32:

"It is admitted that Mr. Bole knew how to remove such a key and it is admitted that Mr. Bole disclosed how to remove the key."

Bole is shown to have done nothing more than to suggest prying the key up and driving it out. His failure to remove the key in the court room with the tool which he says he devised proves conclusively that he did not know how to remove the key. It is to be borne in mind that he is supposed, from his own testimony and that of Heber and Adams, to have known the proper way to remove the key in 1908, namely, to *wedge it up and pry it out, which Houriet found to be the proper method.*

Appellees' Brief, page 32:

"Yet it is on the testimony of the defendant E. C. Wilson alone that the defendants must rely to prove that E. C. Wilson was the originator of this invention."

This has been gone over very thoroughly hereinabove, in pointing out the corroboration of Wilson as to his testimony in these respects.

Appellees' Brief, page 34:

"Mr. Knapp, called by defendants and employed as foreman in defendants' shop, says: * * *"

Counsel makes a misstatement here, and must have known it, as the testimony of Mr. Knapp that he was an employee of the defendant corporation at the time he testified in this case, is as follows:

"Q. You are not connected with them at the present time, are you?

A. No, sir." [Tr. p. 199.]

Appellees' Brief, page 34:

"Mr. Bole testifies that he made the sketch of the single-tee key that the workman used. Mr. Rydgren testifies he had a sketch."

As to this, see testimony of Mr. Knapp [Tr. p. 210]:

"Q. Did you receive instructions as to the making over of this reamer No. 120 from anybody other than the defendant, E. C. Wilson? A. No, sir."

"Q. [Tr. p. 209.] To your knowledge did Robert E. Bole, the complainant in this case, give any instructions or assistance by any act or word of mouth in connection with making over reamer 120 to include the single-piece key? A. Not to my knowledge."

See also testimony of Houriet [Tr. p. 474]:

"Q. From whom did you receive your instructions for making such key? A. Well, the key was brought to me by the foreman, as near as I can remember."

The transcript at page 689 shows that Rydgren, the blacksmith, who testified that he made all of the first single-piece reamer keys, was prevented by the court from testifying whether or not Bole gave any instructions to him at any time for making any such single-piece key. We contend that it was error of the trial court not to permit this material testimony. We attempted to clear up this matter of the sketch which Rydgren says he had, but were not permitted to do so. It is to be noted that Knapp and Houriet completely showed Bole was no source of information regarding the making of this first key.

Appellees' Brief, page 35:

"It is significant of the utter unreliability of his testimony, and doubtless so impressed the trial court, that this shop order does not in any manner refer to this key. The shop order reads as follows:" etc.

In the first place, we have pointed out that this key, being of simple design, was readily sketched by Wilson on the palm of his hand with a pencil for Knapp, the foreman, as Knapp testified, and there is the further reason that there was no sketch of the key attached to the papers of order No. 6904 for making over reamer 120, namely, that nothing in the record makes it appear that Wilson had *finally* decided, the day this order was made out, exactly which form of key he would use. He therefore instructed Knapp to first make up a single-piece key that he sketched on his hand for Knapp, the sketch of the key finally adopted to be added to the order. *And this was done.* On April 22,

1911, Knapp made an outline sketch of the single-piece key made for reamer 120, after it was thoroughly tried out and the method of removing it discovered by Houriet; and that sketch is in evidence and is part of the record of the order No. 6904. So this order does contain a sketch of the key which was made as soon as it was finally determined to use this key and to ship it with reamer 120. This drawing is part of defendants' exhibit "Wilson Exhibit Wilson Reamer Tee and Key Sketch of 1911," shown at transcript page 814. This is the key that was adopted, and the key that Wilson told Knapp first to make. The point is that the finally completed order included such a sketch of the key, and it is immaterial that the first sketch that Knapp had was only drawn upon the palm of Wilson's hand. Certainly Bole had nothing to do with giving this information. There would have been no sense in trying to specify this key in the typewritten instructions of the order No. 6904, inasmuch as, until the particular form of key had been definitely decided upon, the instructions were to be sufficiently flexible to cover such trial of keys as seemed necessary. These orders are matters of permanent record, and it would have been improper to file a specification of the key until the key had actually been decided upon as to its particular form. It must be remembered that this was in a way experimental work, and the shop order covered those parts which it was actually known could be used and which were not experimental. Thus it is seen that the omission of this key from the typewritten part of this order as originally made out is not fully ex-

plained upon possibility, but upon logic and reason and upon proper shop practice.

Appellees' Brief, page 35:

"The sketch for the 'Extra Heavy Slotted Tee of New Type' is shown on page 803 of the transcript and numbered 7056."

This extra heavy slotted tee is thus admitted by counsel for appellees to have been a part of the order given by Wilson. It will be seen that Bole originally claimed to have invented this extra heavy slotted tee back in 1908, although now in this case Bole lays no claim to having devised such heavy style of tee-bar, which, as we have shown, was essential to the use of any key device in order that there should be sufficient strength in the tee. Bole's testimony, originally given, as at transcript page 592, is as follows:

"As I went along in the letter I described the new style reamer and with each description I drew a sketch. I drew a sketch of this key and drew a sketch of the *tee-bar,* and *showed him how he could make it heavier than the old style, or the one that had broken all the time and gave them the trouble.*"

Now, in direct denial of his own party's claim to the invention of such tee or suggestion of such larger tee, we have counsel's statement, at appellees' brief, page 36, as follows:

"In making out shop order No. 6904, Mr. Wilson was only endeavoring to produce *his* 'heavier and stronger' slotted tee."

Thus, Bole having changed his position originally taken in the interference when he comes to testify in the present case, counsel shifts his position with him and, in effect, denies the testimony given by his own party in the interference. Therefore, if counsel has been forced to discard his party's claim to the invention of the tee as originally testified to, how can this court believe Bole's contention, through counsel's mouth, that Bole was the inventor of the key? It would be consistent for this court to disbelieve Bole in regard to the key, inasmuch as his own counsel has come to disbelieve him in regard to the heavier tee.

This heavier slotted tee is shown on transcript page 803 by sketch, the same being admittedly a sketch of Wilson's. Knapp and Wilson both testified that this is Wilson's original sketch, the first sketch made of the heavier slotted tee. Defendant's testimony was so convincing that Bole felt it wise to lay aside the fabrication of his interference testimony as to this tee, and to stick strictly to the key contention. If Bole had invented any such tee, why didn't he make a sketch of it and why was not some sketch made of it at about the time he says he made a sketch of the key-remover on January 27, 1911? Bole contends that he made certain drawings for the shop in 1911, but nobody remembers them, nobody produces them, and they are not shown in any manner to have influenced anybody in making over reamer 120. On the contrary, everybody permitted by the court so to state says that the instructions came from Wilson through the foreman Knapp. As to any papers that Bole contends are sus-

piciously missing from the files of the Wilson & Willard Manufacturing Company, we have to repeat that Bole, with his proved access to the records of the shop during the period from 1908 to February 1, 1913, might, if he were willing, explain to us the disappearance of the same. While preparing his little plot, as we contend, with his chums of Maricopa to back him up on the 1908 assertions, and with his foreman Naphas to back him up on the 1911 allegations, he doubtless did not overlook the wisdom of putting out of the way anything which might conflict with the proper development of his plot. Again we repeat that it was a most remarkable thing for Bole to do, if he did so do, namely, to leave in the hands of Wilson his (Bole's) entire record of anything he may have invented about this reamer, particularly when Wilson was building up the good will and right attaching to the use of the invention.

Appellees' Brief, page 36:

"Neither Mr. Knapp or any other of the workmen even pretends he has any recollection as to these facts of the remodeling of reamer 120 *except as shown by* the time slips and shop orders."

This is not a correct statement of the testimony, as they had to refer to the time slips only for the purpose of refreshing their memories as to dates. The testimony clearly shows that the other circumstances and occurrences in connection with the Wilson reamers, keys therefor, and the remodeling of reamer 120, were

matters of clear, unwavering recollection. For instance, see testimony of foreman Knapp [Tr. p. 232]:

"The Court: The objection is sustained. Mr. Witness, do you remember this reamer 120 being in the shop?

A. Yes, sir.

Q. You distinctly remember that?

A. Yes.

Q. And you made it over?

A. Yes, sir.

Q. You distinctly remember that?

A. Yes, sir.

Q. But you don't have any recollection as to the date in regard to when that work was done except as indicated to your mind by these slips?

A. Yes, sir, which I have O. K.'d.

Q. Have you any independent recollection?

A. No, sir.

Q. You testify, then, from what these slips indicate to your mind is the date when that work was done?

A. Yes, sir.

The Court: I think that makes it clear."

As to Rydgren, it cannot be found that any question was put to him as to whether or not he had any recollection of the key reamer work independently of the shop orders or the time cards. His testimony was clear and positive, as was also the testimony of Houriet. It is quite natural that these employees would need to refer to the time cards, etc., to verify *exact dates,*

when certain specific things in their extensive shop experience were done. No living man could remember such dates in any other way, in the ordinary course of human conduct.

Appellees' Brief, page 36:

"No explanation has ever been offered by Mr. E. C. Wilson of the total silence of shop order #6904 as to this particular key invention which was, according to his testimony, the impelling motive for remodeling reamer 120."

Again counsel misrepresents the testimony. Wilson has repeatedly testified, as [see Tr. p. 105]:

"I went over to a draughting board and myself laid out one of the tees of the slotted type, increasing its size and giving it the size I discovered when I commenced to work on it myself that it could be made. I was surprised to find that it was fully twice as strong as those we had made when that type of reamer was being made by our plant and by the Bakersfield Iron Works. *I then made up my mind that I could go back to the slotted tee type, using the larger proportions of tees.* With that idea thoroughly settled, I checked up by comparing my figures with those of my brother's. We went over them very carefully at that time, January 26, 1911, *and I then made up my mind that it was possible to make a single-piece key which might overcome a few of the minor troubles we had had with the double key type. The double key type was a success* with the *exception of the tee* and possible occasional trouble had by the plug which held half of the double-

piece key in place, when it would rust and stick and sometimes cause trouble to remove. But was really a minor trouble with that key."

It will be quite clear from this testimony that the impelling motive was to return to the preferable slotted-tee type of reamer with any key which could be suitably used, and that, therefore, "the impelling motive for remodeling reamer 120" was to return to this slotted-tee type, which return opened up again the question of the means for confining the lower end spring, and that, therefore, the selection of the new key was the second occurrence in point of procedure and *grew out of the decision to return to the slotted-tee type.*

Appellees' Brief, page 37:

"Yet no mention of the single-piece key was made to the brother, W. W. Wilson, when so discussing the changes in the tee and the rebuilding of the reamer."

This statement is squarely a false summary of the testimony of W. W. Wilson, which is as follows [Tr. p. 272]:

"A. As I remember it I asked Mr. Wilson whether or not he would use the same kind of a key he used in the old reamer, *and he said no, he was going to get one up with a single piece.* He thought it would not give the trouble of wedging against the plug."

Appellees' Brief, page 40:

"Mr. Knapp testified in the case. *He was still in Mr. Wilson's employ,* and we have a right to expect his

testimony would be as favorable to Wilson's story as possible."

Mr. Knapp was not in the employ of Wilson when he testified in this case. See Knapp's testimony [Tr. p. 199]:

"Q. You are not connected with them at the present time, are you?

A. No, sir."

This is a direct misrepresentation of testimony on appellees' part.

Appellees' Brief, page 40:

"His cross-examination demonstrates conclusively that he has no recollection either of the work done or the dates except as these appear on the time slips."

The testimony clearly refers to the fact that the witness had only to refer to the time slips in regard to specific dates. It is an absolutely false statement that the witness had no recollection either of the work done or of the dates. He had very positive and clear-cut recollections of the work he had, and so testified.

Appellees' Brief, page 40:

"He makes a positive misstatement of the work he did."

A careful inspection of Houriet's testimony will fail to reveal any misstatement of Houriet as to the work he did. No specific reference is made to the testimony to support such slur.

Appellees' Brief, page 40:

"He is contradicted and impeached as to such work by the sketch of the slotted tee, [Tr. p. 803] and by the testimony of the foreman, Knapp."

It is to be noted that this is merely an unsupported slur of the testimony, without any reference to the transcript to substantiate it.

Appellees' Brief, page 40:

"He is impeached and contradicted by the testimony he gave in the Patent Office interference."

This again is mere mud-throwing argument, and there is no statement as to how any impeachment and contradiction results. We contend that Houriet's testimony is consistent throughout.

Appellees' Brief, page 43:

"Yet we find that there is no testimony of anyone to corroborate E. C. Wilson's testimony that Mr. Knapp told him (Wilson) that Houriet had made this discovery and took Wilson out to see how Houriet was removing the key. The story then rests on Mr. E. C. Wilson's own words. Knapp does not corroborate him."

It is to be noted that Mr. Knapp is not interrogated on that point. At any rate, he does not contradict Wilson, and W. W. Wilson corroborates Wilson in that regard [see Tr. p. 280]:

"Q. And did you see the reamer disassembled and the key removed after the parts had been first put together?

A. Yes, sir.

Q. How was that done?

A. I was sitting in the office one day and Mr. Knapp came into the office and got myself and Mr. E. C. Wilson and told us to come out into the shop and look at that reamer. He said we didn't need a lever to pry it out. So we went out into the shop, and Mr. Houriet, who was working on the underreamer, had found that —and he did at that time put the underreamer together, and then, with the tang of a file, drove it under one edge of the key and pried it up. He was then enabled to pull the file out and leave the key with the prong sticking up on the edge or corner of the bore; and then he was able to drive the key out the other side. That is the way he dismantled the reamer at that time."

Thus Wilson's testimony is corroborated by W. W. Wilson, and is not denied by Knapp, who was not interrogated on that point.

Appellees' Brief, page 44:

"Mr. Houriet does not remember ever having shown W. W. Wilson how such key could be so removed."

Again Houriet is not questioned on that point, but does say that he demonstrated that operation for many people. For counsel to show that Houriet does not remember this without pointing out any place in which he was asked whether he remembered it is begging the question and distorting the testimony, with an implication that is not founded upon the record.

Appellees' Brief, page 45:

"In this connection it must be remembered that Mr. Knapp does not testify that he called E. C. Wilson's attention to this discovery, nor does he in any manner mention the brother, W. W. Wilson, in this connection."

Knapp does not contradict Wilson on this point in his testimony, but E. C. Wilson and W. W. Wilson, taken together, make a clear proof of this occurrence.

We have shown that Knapp testified that Houriet came to him and said that he discovered a way of taking the key out with a file. The only witnesses who attempted to upset this discovery of Houriet's are Bole and his former foreman, Naphas. Both of these witnesses are thoroughly contradicted and impeached, Bole being impeached by his own mouth particularly with relation to the alleged thin key which he is supposed to have produced earlier than the key for reamer 120, made under Knapp's instructions. In this connection it will be seen that both Naphas and Bole disagreed entirely as to who was present on the occasion of this alleged prying out of the key by Bole.

Bole testifies [Tr. p. 513] that Houriet, Wilcox, E. C. Wilson, Naphas and himself were present, whereas Naphas testifies [Tr. p. 619] that Bole, Naphas and E. C. Wilson were present, *and no one else*. Which of these two otherwise unbelievable witnesses is therefore to be believed in this instance? This is a much more serious proposition for appellees than the question as to whether Knapp and Willard were present at

the February 3 conference, inasmuch as Wilson is thoroughly corroborated by two witnesses, whereas Bole is directly contradicted by his own witness, and Naphas was found to have been absolutely in error as to even the year that this key removing was supposed by him to have taken place. We have pointed out above that even Bole confuses the year 1911 with the year 1913, even after the court calls his attention to his apparent discrepancy.

*In this connection it is significant to point out that order No. 6904 for this reamer showed no time cards turned in by Bole for any work on a key of this reamer or anything else in connection with this reamer No. 120. Had he done any work on this job, the shop orders and time cards would have shown it.*

Appellees' Brief, page 47:

"W. W. Wilson, like the other workmen in the shop, had no definite recollection of any of these facts other than as they are shown by the shop records."

Again the very lengthy testimony of Wilson shows that it was only with respect to specific details that Wilson had to refer to the shop records. He had very clear and full recollections independently of the shop records as to all matters of construction, sketches, disclosures, and commencement of reduction to practice of the invention involving the key.

Appellees' Brief, page 48:

"It is passing strange that if W. W. Wilson was a party to the explanation of this discovery by Mr. Houriet to E. C. Wilson, that neither E. C. Wilson

nor Mr. Knapp nor Mr. Houriet remembers W. W. Wilson as having anything to do with the matter, or as having been present."

As above observed, there is no testimony of anyone to show that W. W. Wilson was not present, and the testimony of Wilson, W. W. Wilson and Houriet and Knapp all fits together to make a strong positive showing as to this first key removing by *wedging up the key.*

Appellees' Brief, page 48:

"It is to be considered in this connection that the trial court recalled Mr. E. C. Wilson and questioned him in regard to this occurrence and gave him several opportunities to state who was present when he, E. C. Wilson was shown by Mr. Houriet how to remove this key in the manner referred, Mr. E. C. Wilson fails utterly to name anyone except Mr. Houriet who was present, yet it is to be remembered that this testimony was taken in open court; that Mr. E. C. Wilson had heard this testimony given by his brother, W. W. Wilson, and that he knew the purpose of the court was to compare the testimony on this point."

The examination by the court in that regard was as follows [p. 699]:

"The Court: All right. Mr. Wilson, who first showed you that this single-piece key could be removed with a chisel or a file?

A. Mr. Houriet.

Q. When was that?

A. That was just at the time the reamer was first

completed so it could be assembled; it was some time in the latter part of February, I should judge, 1911.

Q. What did Mr. Houriet remove the key with?

A. He removed it with the tang of a file; he had a piece of a file that he picked off the floor and put the end in one end of it and pried it out.

Q. That was the first time you saw that done?

A. That was the first time I ever saw that done.

Q. How had the key been removed prior to that time?

A. We had removed it two or three times with a lever. When the reamer was first assembled we had fashioned the key so it could be removed with a lever, but later it was changed over and was one which we had in stock for another purpose, and it was not an easy task to remove the key that way, and it was giving me some little concern, always had from the time I had first thought of a single-piece key, and I was sitting in the office and Mr. Knapp came in, very much elated about something, and he said, 'Wilson,' he said, 'we don't need that lever to take that key out of that reamer.'

Q. Who said that?

A. Mr. Knapp, the foreman and I said, 'Well how are you going to do it, William?' 'Well,' he said 'come out and I will show you what Houriet has done.' So he took me out to the shop where Mr. Houriet had been working on the reamer, and Mr. Houriet took a file and drove one end of it underneath the key and drove the key out. I saw Mr. Houriet do that many times afterwards in demonstrating the reamer to

respective customers and people who were there interested in oil well tools.

Q. Well, did you ever see Mr. Bole remove it with a file?

A. I never did.

Q. When did you commence manufacturing these single-piece keys in the business?

A. May or June of 1911.

Q. May or June, 1911?

A. Yes.

Q. Now, during the year 1911 were you manufacturing very many of these reamers with that single key?

A. Yes, sir, we made quite a number of them; yes, sir, after we first adopted them we made them regularly.

Q. Made them regularly?

A. Yes, sir.

Q. And in fact, you abandoned the other style?

A. Yes, sir. We went cautiously at first and found that it worked out so satisfactorily that we could certainly adopt it.

Q. And kept that up during 1912, manufacturing these keys right along?

A. All the time.

Q. All the time?

A. Yes, sir; and still making them.

Q. Yes. Well, during that time, 1911, the balance of 1911 and of 1912, did you manufacture any double-key device?

A. No, sir.

Q. Did you manufacture any other reamer with other means of fastening?

A. I don't believe we made any other block-and-screw or double key type, but we have done so here the last few months.

Q. By Mr. Blakeslee: Which, during the last few months, if I may ask?

A. I believe in December.

Q. I mean which type.

A. Oh, we made some block-and-screw type reamers during December, January, February and March of this year.

Q. They were so ordered, were they?

A. They were so ordered.

"The Court: That is all. Do you want to ask him any questions?

Mr. Blakeslee: No, sir."

This testimony certainly does not show that Wilson was reluctant to give any testimony as to any pertinent question. He definitely and clearly answered the questions asked him, and it was probably not assumed by the court that it was necessary for Wilson to go further into the question as to who was present at that time.

As to the discussion by counsel on page 58 of appellees' brief, that Wilson was forced to change his testimony by the production of the Kibele letter of February 28, 1911, and place the time of Houriet's alleged accidental discovery prior to the date of that letter instead of after: we do not find that Wilson has been forced to change his testimony in these par-

ticulars in any respect. Furthermore, Wilson produced this Kibele letter himself originally in the interference, and it was not, as counsel would imply, sprung upon him in order to force him to change his testimony. We fail to find where any shift was made in Wilson's testimony after this letter was made of record. At any rate, the prying up of the key referred to in the Kibele letter was not the wedging up of the key that Houriet did.

In answer to counsel's observations on page 59 of appellees' brief, to the effect that it is significant that defendant did not examine Willard as to the February 3, 1911, conference, it may be stated that, Willard having testified that he did not remember that particular conference, certainly would have made it futile to have examined him in detail about it. As pointed out above, Willard does state that there were a number of conferences about that time concerning this key reamer.

Counsel's contentions on page 59 of appellees' brief, that the deposition in the Patent Office interference between Bole and Wilson is not testimony in this case, and that it was used, and can only be used, for the purpose of showing discrepancies between the testimony taken in that proceeding and in this case, and not as testimony in chief, and that the trial judge so ruled, is apparently not borne out by the record. [See Tr. p. 303.]

Counsel refers to transcript page 303 to support this contention, and to quote such ruling, when, as a matter of fact, the ruling on that page of the transcript

had nothing to do whatsoever with the question of propriety of the use of the Patent Office depositions. How can counsel possibly twist the ruling on that page of the transcript into a ruling pertinent to the propriety of the use of the Patent Office depositions?

All of which annihilation of the straw man which counsel for appellees sets up, namely, the straw man which is supposed to defeat appellants by way of discrepancies and contradictions as between the testimony of appellants' witnesses, goes hand in hand with the annihilation of the straw man set up by appellees to champion their case, namely, the straw man representing the contentions that Bole came in "after the fact" and had something to do with the assembling of a reamer with the key and the wedging of the key out. In other words, counsel has attempted, by garbling the record, to make it appear that the appellees are frightfully mixed as among themselves in establishing Wilson's original and diligent conception, making of sketches, disclosure, and commencement of reduction to practice of the invention of the patent in suit. When the record is *truly* read and interpreted, not falsely read and interpreted, as appellees' brief would handle it, the case of appellants in these respects is thrown strongly into relief and found to be an impregnable defense on that side of the case. Likewise, appellees' attempts to ride in on the back of Wilson's diligence are found to be pitiably lacking in any elements of strength or consistency. All of this campaign of misrepresentation and slurring of appellants' witnesses was doubtless waged to draw the attention of the court

away from those other defenses which utterly control this case, namely, *the burden of proof was shifted to the complainants by the anticipatory fact of Wilson's earlier manufacture, that the burden is imposed upon complainants because of the doctrine of Morgan v. Daniels pertinent to the Patent Office decision on the question of originality and priority as between Wilson and Bole, and the necessity, therefore, of appellees establishing the fact that Bole had this invention and disclosed it to Wilson before Wilson independently did anything in and about the invention.* As the Bole invention is anticipated by the Wilson manufacture, as Wilson is shown to have been the prior and diligent inventor beyond shadow of doubt, and as the Patent Office has so found, the appellees, with the double burden imposed upon them as previously set forth, must prove that Bole previously had the invention and disclosed it to Wilson before Wilson did anything in and about the invention. That appellees apparently admit this cannot be done is shown by the tactics of counsel on argument and in brief, as exhaustively and minutely pointed out hereinabove, and by counsel's apparent withdrawal of contention that Bole had the invention as early as 1908, for that is not brought to the front of the case as a controlling factor. Rather, appellees rely upon attack upon appellants' proofs, coupled with misrepresentation of the record and further supplemented by unsupported contentions that Bole had something to do with the invention "after the fact," namely, with respect to getting the key invented by Wilson out of the reamer after it was put

in. Appellees must have known and realized that with Bole's claims stranged by the estoppel resulting from his failure to speak out if he could have claimed the invention during the 20 months or so that Wilson was asserting his rights to it and taking the field with it prior to the letter of protest of January 17, 1913, it would be useless to try to show this court that Bole had the invention in 1908. In other words, appellees would have simply been pointing out the applicability of this doctrine of estoppel, if they had over-insistently represented to this court that Bole had the invention in 1908. In addition to all this, we have the covenant of Bole to put the invention forever away from him and never in any manner to assert his right to it and thereby or in any manner to harm defendant by reason of any such assertion, as a part condition for the compromise settlement of February 1, 1913. So, particularly in view of appellees' brief and argument, we cannot see that, even when the facts are considered aside from the equities and doctrines of law involved, appellees can prevail, because of estoppel and laches attaching to Bole's attitude and procedure, plus his concealment from Wilson of the invention from 1908 until 1913, if in fact he was in possession of it other than by information received from Wilson. There is the duty of one to speak out when another is invading his rights. This principle involved in patent law is too well established to require discussion or citation of further authorities. The opening brief of appellants discusses this question and the question of

concealment, with authorities, on page 114, the estoppel, of course, being predicated upon concealment.

We insist, however, that this appeal involves several controlling principles of law and equity which the lower court entirely ignored, as reflected by the decision in the case, or at least entirely failed to apply. It certainly cannot be equity of any kind to permit a disgruntled debtor to make away with the good will of his creditor by assertion of a right to an invention upon any such proofs as appellees have brought forth, in the face of such inhibitive laches and estoppel. After all, the whole record shows that Wilson was the logical inventor, the true and original inventor, and the man who gave the invention to the world, and the Patent Office have twice said he is resultantly entitled to a patent for the invention of the patent in suit.

Appellees make some contentions, direct and implied, on brief and argument, that the judgment of the Patent Office is not final in that appeal has been taken in the interference matter by Bole. Counsel is misleading with respect to the use of his term "judgment," for he well knows that the only "judgment" rendered is that recorded in the opinion filed, and that under the Patent Office rules automatically the procedure of rejecting or allowing the applications of the parties involved in the interference takes place; the successful party, if the application is still pending, being granted a patent, and the unsuccessful applicant being denied a patent as to the subject-matter of the interference. In the present case the Patent Office has twice said Wilson is entitled to the patent, which is tantamount

to saying that Bole improperly received a patent, and unless the Commissioner of Patents shall reverse the two lower tribunals who have decided in favor of Wilson, and unless the final tribunal in the Patent Office forum, namely, the Court of Appeals of the District of Columbia, shall find upon appeal for Bole, a patent will issue to Wilson which will be just as good a patent as the patent issued to Bole and Double, and it will *not* be necessary for Wilson to proceed under section 4918 to cancel the Bole patent unless he so desires, but he can utilize his monopoly unhampered, until such time as the prior Bole patent which the interference proceedings determined were improperly issued to Bole, be raised or asserted against him, and Wilson desires to have it eliminated from the field and takes proceedings under said last mentioned section in that direction.

It is interesting to note in this connection that in Morgan v. Daniels, which, in spite of counsel's efforts to befog the issue, was the final determination of a contest as to priority between the parties, and which contest had been decided by the Commissioner of Patents in favor of the party whom the Supreme Court upheld, the Supreme Court found in support of the findings of the *Examiner of Interferences*, the lowest tribunal of the Patent Office in these interference matters which are conducted pursuant to the provisions of the Revised Statutes, section 4904. Therefore, this court in the case at bar is only asked to find in accordance with the findings of this same tribunal, reinforced by the findings of the next higher tribunal, the Board of Examiners in Chief;—

in other words, merely to endorse the findings of that tribunal in the Patent Office which the Supreme Court of the United States endorsed in Morgan v. Daniels, and in so doing likewise to endorse the findings of the Board of Examiners in Chief, the next higher tribunal. In Morgan v. Daniels there had been a reversal of the Examiner of Interferences by the Board. In the case at bar, as to the interference between Bole and Wilson, the Board has affirmed the findings of the Examiner of Interferences that Morgan v. Daniels arose under U. S. R. S., Sec. 4915 is immaterial.

Counsel refers to the presumption of validity attaching to the issuance of the Bole patent in suit. What can remain of any such presumption after the very branch of the government which issued the patent has twice in effect admitted the error of so doing and so hastily and inadvertently doing while the Bole and Wilson applications were co-pending in the Patent Office and prior to declaration of interference? In fact, the position of the Patent Office in this respect is as follows:—it has said that Wilson is the inventor and not Bole, and it has said so each time this issue has been decided, and it has done everything it possibly could do to correct its earlier error and inadvertence. It cannot withdraw or cancel the Bole patent, but in so far as its corrective action can go, it has stamped out the life it originally erroneously infused into the body of the Bole patent.

Counsel on brief and argument has referred to the decision of the Commissioner of Patents rendered September 15, 1915, to stay its interference in Wilson

v. Bole, and has made it appear that such stay was granted because of some tacit admission that the decision of this appellate court would be controlling on the Patent Office. We contend that under section 4904 there can be no control of the Patent Office by any court as to the issues properly to be determined by the Patent Office, and that decision of the Commissioner which is the decision of a federal tribunal on motion, we will now quote from to show that the main ground upon which this motion was decided in favor of Bole was, as clearly indicated, the provision of sufficient time for counsel of appellees to journey to Washington and also to argue the appeal in the case at bar, and also inferentially that the Patent Office might be advised as to the findings of this court as it has of the findings of the Patent Office. It will be noted from this decision that the Commissioner of Patents is to set a day within the present month of October for argument, giving counsel time to come from Los Angeles. This opinion, the whole import of which has been so garbled by counsel, is as follows, being in the matter of Interference No. 37,126, between Wilson and Bole:

"Motion to Postpone.

This is a motion to postpone the hearing now set for October 11, 1915. It appears that an appeal in a suit by Bole against Wilson, in which the defense of inventorship by Wilson was set up, is to be argued before the Court of Appeals of the Ninth Circuit on October 4, and that counsel for Bole, residing in Los Angeles, wishes to take part of the argument of both appeals.

As the time between October 4 and October 11 is too short for convenient travel from Los Angeles, and the hearing in Los Angeles may not be had on the date set, I will order that the matter be brought on before me on the 11th of October, as now noted. If at that time the appeal in the Court of Appeals of the Ninth Circuit has been argued, or is on the point of being argued, I will adjourn the hearing herein to await the decision of the Court of Appeals. If it has not been argued and is not set for argument on a day certain within the month of October, I will on the 11th set a day within the month of October for the argument before me, giving counsel time to come from Los Angeles.

(Signed) THOMAS EWING,
*Commissioner.*

September 15, 1915."

Counsel would make it out that the mere taking of an appeal from the decision of the Board of Examiners in Chief of the Patent Office nullifies the effect of such finding. This is not so. The findings stand in full force and effect until a reversal has been made. In other words, on the records of the Patent Office now, Wilson is the party entitled to a patent for the subject-matter of the Bole patent in suit. That this is the law in federal procedure, see

> Norton v. Taxing District of Brownsville, 36 Fed. R. 99, 2nd syl., and p. 100, at bottom, and p. 101, at top, and p. 102, line 11, to end of opinion.

The contention has been raised that no exceptions were taken at the trial. Rule 46 is apparently the only one of the new equity rules concerning exceptions,

and that only refers to evidence offered and excluded. This rule is not brought particularly into play on any of the grounds of error urged in appellants' assignment.

In conclusion, we contend that the misrepresentation of the record and facts in appellees' brief is repugnant to fair play and highly significant and can hardly be explained as being the result of mere carelessness, upon which score it is equally to be condemned. We believe that such misrepresentations on argument and in brief would justify the court in ignoring such argument and brief of appellees in determining the issues in this case. When this court has realized, as pointed out, that Wilson's chief competitor and opponent in extensive litigation, Double, president of the Union Tool Company, involved in such litigation, is one of the complainants in this case, and that Bole rushed to him as soon as he had made a cheap settlement with Wilson and promised to do nothing more about the key matter, and assigned an interest in the key invention of the patent in suit to Double, we believe that the motive and animus behind this dispute will be clearly visible.

Again, appellants respectfully urge that the decree of the lower court be reversed and the bill dismissed, within all good conscience and equity and law, as well as upon the facts of the case.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,
*Counsel for Appellants.*

No. 2643

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

# Transcript of Record.

**(IN TWO VOLUMES.)**

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Defendant in Error.

**VOLUME I.**

**(Pages 1 to 320, Inclusive.)**

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and for the Northern District of California.*

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Complaint.**

Now comes California Adjustment Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in said Northern District of California, and complains of the defendant Southern Pacific Company, a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and for a first cause of action alleges:

I.

That plaintiff is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is and at all times herein mentioned was in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Ken-

tucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said state.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California. [1*]

IV.

That on the 22d day of September, 1911, at the said point of shipment, G. H. Tay Co., delivered to defendant for transportation from said point of shipment to Valley Foundry & Machine Works, hereinafter called plaintiff's assignor, at said station of delivery, 4460 pounds of castings and fittings; that said defendant transported said property from said point of shipment to said station of delivery, and

*Page-number appearing at foot of page of certified Transcript of Record.

thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 44 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 26th day of September, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the tranportation of said property, to wit, the sum of $19.62; that said property was covered by defendant's waybill No. 25455; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $2.90 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles. That plaintiff's assignor is and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action

plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. **[2]**

Cause of Action No. 2.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times

herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 28 day of March, 1911, at the said point of shipment, Tubbs Cordage Co. delivered to defendant for transportation from said point of shipment to J. F. Lucey Co., hereinafter called plaintiff's assignor, at said station of delivery, 2073 pounds of Rope; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 72 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the

said City of Los Angeles the sum of 42½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit on the 30 day of March, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $14.93; that said property was covered by defendant's waybill No. 31233; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $6.11 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[3—2]**

Cause of Action No. 3.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times,

II.

was a resident of said District.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery that at all times herein mentioned said

defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 16 day of March, 1911, at the said point of shipment, Tubbs Cordage Co. delivered to defendant for transportation from said point of shipment to J. F. Lucey Co., hereinafter called plaintiff's assignor, at said station of delivery, 2102 pounds of Rope; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 72 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 42½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 18 day of March, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $15.13;

that said property was covered by defendant's way-bill No. 17303; that the said payment so made and the said charges so exacted by defendant exceeded by the sum of $6.20 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[4—3]**

Cause of Action No. 4.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times

was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said state.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 24 day of January, 1911, at the said point of shipment, Tubbs Cordage Co. delivered to defendant for transportation from said point of shipment to J. F. Lucey Co., hereinafter called plain-

tiff's assignor, at said station of delivery, 7042 pounds of Rope; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 72 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 42½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 26 day of January, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $50.70; that said property was covered by defendant's waybill No. 23746; that the said payment so made, and the said charges so exacted by defendant exceeded the sum of $20.74 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action

plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[5—4]**

Cause of Action No. 5.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of trans-

porting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 20 day of February, 1911, at the said point of shipment, M. J. Brandenstein delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 39,400 pounds of Rice; that said defendant transported said property from said point of shipment to said station of delivery; and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hun-

dred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 24 day of February, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $141.84; that said property was covered by defendant's waybill No. 1244; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $33.49 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [6—5]

Cause of Action No. 6.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station

of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 12 day of January, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,200 pounds of Rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's as-

signor, to wit, on the 15 day of January, 1911, said plaintiff's assignor was compellel to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.72; that said property was covered by defendant's waybill No. 716; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.17 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [7—6]

Cause of Action No. 7.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and

property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8 day of February, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of Rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 11 day of February, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 493; that the said payment so made, and the said charges so exacted by

defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [8—7]

Cause of Action No. 8.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 23d day of September, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter

called plaintiff's assignor, at said station of delivery, 40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 25 day of September, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 1825; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [9—8]

Cause of Action No. 9.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said

times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8th day of August, 1911, at the said point of shipment, H. Janes Co. delivered to defendant for transportation from said point of shipment to Barret-Hicks Co., hereinafter called plaintiff's assignor, at said station of delivery, 4060 pounds of pipe and fittings; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to

said station of delivery the sum of 44 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 10 day of August, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $17.86; that said property was covered by defendant's waybill No. 8987; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $2.64 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[10—9]**

Cause of Action No. 10.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the

station of Porterville, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 19 day of April, 1911, at the said point of shipment, American Radiator Co. delivered to defendant for transportation from said point of shipment to Barrett-Hicks Co., hereinafter called plaintiff's assignor, at said station of delivery, 5428 pounds of rods; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 61 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the

22d day of April, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $33.11; that said property was covered by defendant's waybill No. 21402; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $12.75 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[11—10]**

Cause of Action No. 11.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing un-

der and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery, that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 27 day of August, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 1 day of September, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 327; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge

then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [12—11]

Cause of Action No. 12.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing

under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 14 day of August, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of Rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plain-

tiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of propery from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 18 day of August, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 1513; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive

charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excesisve charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[13—12]**

Cause of Action No. 13.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times

herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8 day of July, 1911, at the said point of shipment, American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the

said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 11 day of July, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 743; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and ex-

isting under and by virtue of the laws of the State of California. [14—13]

Cause of Action No. 14.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant

from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1 day of June, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of Rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 3 day of June, 1911, said plaintiff's assignor was compelled to pay and did pay

to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 116; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[15—14]**

Cause of Action No. 15.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under

and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 19 day of April, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of Rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 22 day of April, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 1526; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the

charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [16—15]

Cause of Action No. 16.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein men-

tioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 14 day of March, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of Rice; that said defendant transported said property from said point of shipment

to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 17 day of March, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 902; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand

of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times here mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [17—16]

Cause of Action No. 17.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Porterville, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 18 day of January, 1911, at the said point of shipment, American Radiator Co. delivered to defendant for transportation from said point of shipment to Barrett-Hicks Co., hereinafter called plaintiff's assignor, at said station of delivery, 2803 pounds of radiators and parts; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 61 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defend-

ant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 21 day of January, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $17.10; that said property was covered by defendant's waybill No. 17611; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $6.59 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times here

mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [18—17]

Cause of Action No. 18.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station

of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1 day of September, 1911, at the said point of shipment, Crane Company delivered to defendant for transportation from said point of shipment to Barrett-Hicks Co., hereinafter called plaintiff's assignor, at said station of delivery, 11382 pounds of pipe and fittings; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 44 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 6th day of September, 1911, said plain-

tiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $50.08; that said property was covered by defendant's waybill No. 732; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $7.40 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [19—18]

Cause of Action No. 19.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned

was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Leslie in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Sanger, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 4 day of October, 1911, at the said point of shipment, C. E. Whitney delivered to defendant for transportation from said point of shipment to Coblintz Bros. Co., hereinafter called plaintiff's assignor, at said station of delivery, 30070 pounds of salt; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 18½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 15 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 6 day of October, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $55.63; that said property was covered by defendant's waybill No. 640; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $10.52 (hereinafter called said excessive charge) the charge then made by defendant for the

transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[20—19]**

Cause of Action No. 20.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing

under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Leslie in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Sanger, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 21 day of March, 1911, at the said point of shipment, G. E. Whitney delivered to defendant for transportation from said point of shipment to Coblentz Bros. Co., hereinafter called plaintiff's assignor, at said station of delivery, 34,410 pounds of salt; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that

said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 18½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 15 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 25 day of March, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $63.65; that said property was covered by defendant's waybill No. 197; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $12.04 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this

action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [21—20]

Cause of Action No. 21.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times

herein mentioned operated, a railroad from the City of Crockett in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Sanger, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 31 day of March, 1911, at the said point of shipment, Crockett Sugar Co. delivered to defendant for transportation from said point of shipment to Coblentz Bros. Co., hereinafter called plaintiff's assignor, at said station of delivery, 40,400 pounds of sugar; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of

shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 1 day of April, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $148.47; that said property was covered by defendant's waybill No. 261; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $37.37 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[22—21]**

Cause of Action No. 22.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Paraffin in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant

was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 29 day of August, 1911, at the said point of shipment, Paraffin Paint Co. delivered to defendant for transportation from said point of shipment to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 46,534 pounds of roofing; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 1 day of September, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said prop-

erty, to wit, the sum of $167.52; that said property was covered by defendant's waybill No. 2028; that the said payment so made, and the charges so exacted by defendant exceeded by the sum of $39.55 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [23—22]

Cause of Action No. 23.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern

District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Paraffin in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8 day of June, 1911, at the said point of shipment, Paraffin Paint Co. delivered to defendant for transportation from said point of shipment

to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 30,062 pounds of roofing; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 12 day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $108.22; that said property was covered by defendant's waybill No. 1245; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $25.55 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[24—23]**

Cause of Action No. 24.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said

times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Livny, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Sanger, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1 day of April, 1911, at the said point of shipment, Bower Bros. delivered to defendant for transportation from said point of shipment to Coblentz Bros. Co., hereinafter called plaintiff's assignor, at said station of delivery, 35,000 pounds of sulphur; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to

said station of delivery the sum of 22½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles, the sum of 15 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 4 day of April, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $63.75; that said property was covered by defendant's waybill No. 65; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $11.25 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[25—24]**

Cause of Action No. 25.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the

station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 18 day of September, 1911, at the said City of Los Angeles, Western Hardwood Lumber Co. delivered to defendant for transportation from said City of Los Angeles to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 8560 pounds of lumber; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 63 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's

assignor, to wit, on the 22 day of September, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $53.93; that said property was covered by defendant's waybill No. 14,005; that the said payment so made, and the said charges so exacted by defendant exceeded the sum of $21.82 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. **[26—25]**

Cause of Action No. 26.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned

was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 27 day of July, 1911, at the said City of Los Angeles, Monarch Sign Co. delivered to defendant for transportation from said City of Los Angeles to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery. 2010 pounds of lumber; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 63 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 31 day of July, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $12.66; that said property was covered by defendant's waybill No. 22,043; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $4.12 (hereinafter called said excessive charge) the charge then made by defendant

for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [27—26]

Cause of Action No. 27.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing

under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 30th day of January, 1911, at the said City of Los Angeles, Pioneer Paper Co. delivered to defendant for transportation from said City of Los Angeles to Fresno Planing Mills Co., hereinafter called plaintiff's assignor, at said station of delivery, 37,800 pounds of roofing; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for

delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 56 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 3d day of February, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $211.68; that said property was covered by defendant's waybill No. 22,157; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $107.73 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action

plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [28—27]

Cause of Action No. 28.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

The plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times

herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1st day of April, 1911, at the said City of Los Angeles, Holt Manufacturing Co. delivered to defendant for transportation from said City of Los Angeles to Barrett-Hicks Co., hereinafter called plaintiff's assignor, at said station of delivery, 8880 pounds of sweeping compound, that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 74 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said

City of Los Angeles to the said City of San Francisco the sum of 48½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 4 day of April, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $65.72; that said property was covered by defendant's waybill No. 208; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $22.64 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [29—28]

Cause of Action No. 29.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occu-

pation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 9 day of August, 1911, at the said City of Los Angeles, Bennett Bros. delivered to defendant for transportation from said City of Los Angeles to Barrett-Hicks Co., hereinafter called plaintiff's assignor, at said station of delivery, 5750 pounds of gasoline engine and parts; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 79 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of propehty from said City of Los Angeles to the said City of San Francisco the sum of 60 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 12 day of August, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the

sum of $45.43; that said property was covered by defendant's waybill No. 7985; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $10.92 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [30—29]

Cause of Action No. 30.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of

California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 18 day of August, 1911, at the said City of Los Angeles, Pioneer Truck Co. delivered to defendant for transportation from said City of Los Angeles to Archibald Implement Co. hereinafter

called plaintiff's assignor, at said station of delivery, 4350 pounds of buggies and shafts; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 118½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 90 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 21 day of August, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $51.55; that said property was covered by defendant's waybill No. 15,444; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $12.40 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation

duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. **[31—30]**

Cause of Action No. 31.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occuption of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State, to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 15 day of August, 1911, at the said City of Los Angeles, California Milling Co. delivered to defendant for transportation from said City of Los Angeles to Charles Asher, hereinafter called plaintiff's assignor, at said station of delivery, 30,144 pounds of flour; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 30 cents per

hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 22½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 18 day of August, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $90.43; that said property was covered by defendant's walbill No. 11,920; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $22.61 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein

mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [32—31]

Cause of Action No. 32.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State, to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of San

Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 24 day of January, 1911, at the said City of Los Angeles, M. A. Newmark Co. delivered to defendant for transportation from said City of Los Angeles to Charles Asher, hereinafter called plaintiff's assignor, at said station of delivery, 2925 pounds of soap; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 61 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 26 day of January, 1911, said plaintiff's assignor was

compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $17.84; that said property was covered by defendant's waybill No. 17,426; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $6.87 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [33—32]

Cause of Action No. 33.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California;

that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8 day of June, 1911, at the said City of

Los Angeles, Pacific Hardware & Steel Co. delivered to defendant for transportation from said City of Los Angeles to Charles Asher, hereinafter called plaintiff's assignor, at said station of delivery, 2970 pounds of corrugated iron; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 53 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 10 day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $15.73; that said property was covered by defendant's waybill No. 5732; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $4.60 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and

class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [34—33]

Cause of Action No. 34.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said de-

fendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 27 day of July, 1911, at the said City of Los Angeles, M. A. Newmark Co. delivered to defendant for transportation from said City of Los Angeles to Charles Asher, hereinafter called plaintiff's assignor, at said station of delivery, 3529 pounds of sugar; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plain-

tiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 53 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 29 day of July, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $18.70; that said property was covered by defendant's waybill No. 23,037; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.47 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's

assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[35—34]**

Cause of Action No. 35.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of

Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 30 day of August, 1911, at the said City of Los Angeles, M. A. Newmark Co. delivered to defendant for transportation from said City of Los Angeles to Charles Asher, hereinafter called plaintiff's assignor; at said station of delivery, 3630 pounds of soap; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintoff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 53 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported

by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 1 day of September, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $19.24; that said property was covered by defendant's waybill No. 26,638; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.63 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [36—35]

Cause of Action No. 36.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Giant in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and prop-

erty by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1 day of May, 1911, at the said point of shipment, Giant Powder Works delivered to defendant for transportation from said point of shipment to Charles Asher, hereinafter called plaintiff's assignor, at said station of delivery, 31,097 pounds of high explosives; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 108 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 60 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 2 day of May, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $335.85; that said property was covered by defendant's waybill No. 776; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of

$149.27 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [37—36]

Cause of Action No. 37.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein men-

tioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Giant in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 21 day of February, 1911, at the said point of shipment, Giant Powder Works, delivered to defendant for transportation from said point of shipment to Charles Asher, hereinafter called plaintiff's assignor, at said station of delivery, 575 pounds of explosive; that said defendant transported said property from said point of shipment to said station

of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 216 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 120 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 2 day of March, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $12.42; that said property was covered by defendant's waybill No. 232; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.52 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive

charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [38—37]

Cause of Action No. 38.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times

herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 12 day of June, 1911, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 26,350 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles

the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 15 day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $98.81; that said property was covered by defendant's waybill No. 11,476; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $32.94 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [39—38]

Cause of Action No. 39.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles, passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transport-

ing for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entiely within the State of California.

IV.

That on the 16 day of August, 1911, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 24,000 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 19 day of August, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $90.00; that said property was covered by defend-

ant's waybill No. 19,266; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[40—39]**

Cause of Action No. 40.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all of

said times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 21 day of April, 1911, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plain-

tiff's assignor, at said station of delivery, 25,100 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 25 day of April, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $94.13; that said property was covered by defendant's waybill No. 25,018; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $31.37 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[41—40]**

Cause of Action No. 41.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district;

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said

times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 7 day of July, 1911, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 27,600 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to

said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 7 day of July, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $103.50; that said property was covered by defendant's waybill No. 5641; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.50 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That

defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[42—41]**

Cause of Action No. 42.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to

said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 4 day of May, 1911, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 25,000 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said

property to plaintiff's assignor, to wit, on the 8 day of May, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $93.75; that said property was covered by defendant's waybill No. 5165; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $31.25 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[43—42]**

Cause of Action No. 43.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property

by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 18 day of July, 1911, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 29,400 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 21 day of July, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $110.25; that said property was covered by defendant's waybill No. 20,130; that the said payment so made, and the said charges so exacted by

defendant exceeded by the sum of $36.75 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [~~44—43~~]

Cause of Action No. 44.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 20th day of May, 1911, at the said City of Los Angeles, M. A. Newmark & Co. delivered to defendant for transportation from said City of Los Angeles to Chas. Asher, hereinafter called plaintiff's assignor, at said station of delivery, 1512 pounds of

sugar; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 53 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 23d day of May, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $8.01; that said property was covered by defendant's waybill No. 16,814; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $2.34 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and

set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[45—44]**

Cause of Action No. 45.

For another further, and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Cailfornia; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by vitrue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Delano, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 30th day of June, 1911, at the said City of Los Angeles, Pacific Hardware and Steel Co. delivered to defendant for transportation from said City of Los Angeles to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 2,475 pounds of galvanized iron; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 55 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction

of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 3d day of July, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $13.61; that said property was covered by defendant's waybill No. 25,021; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $4.33 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is and at all times in this

complaint mentioned was, a citizen of the State of California. [46—45]

Cause of Action No. 46.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles

than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 21 day of February, 1911, at the said City of Los Angeles, M. A. Newmark & Co. delivered to defendant for transportation from said City of Los Angeles to Chas. Asher, hereinafter called plaintiff's assignor, at said station of delivery, 2,800 pounds of tomatoes; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 53 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 24 day of February, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said

charges so demanded by defendant for the transportation of said property, to wit, the sum of $14.84; that said property was covered by defendant's waybill No. 17,904; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $4.34 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [47—46]

Cause of Action No. 47.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times

herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Delano, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1 day of June, 1911, at the said City of Los Angeles, Pacific Hardware & Steel Co. delivered to defendant for transportation from said City

of Los Angeles to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 2,985 pounds of sheet iron; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 55 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 3 day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $16.42; that said property was covered by defendant's waybill No. 607; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.22 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is and at all times in this complaint mentioned was, a citizen of the State of California. [48—47]

Cause of Action No. 49.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California, that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 11th day of March, 1911, at the said City of Los Angeles, Union Carbide Co. delivered to defendant for transportation from said City of Los Angeles to Chas. Asher, hereinafter called plaintiff's assignor, at said station of delivery, 2140 pounds of carbide, that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 58 cents per hundred

pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 14th day of March, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $12.41; that said property was covered by defendant's waybill No. 9648; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $3.16 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein

mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [49]

Cause of Action No. 50.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of San Fran-

cisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said rairoad; that said railroad is entirely within the State of California.

IV.

That on the 27th day of March, 1911, at the said City of Los Angeles, Baker & Hamilton delivered to defendant for transportation from said City of Los Angeles to Chas. Asher, hereinafter called plaintiff's assignor, at said station of delivery, 1845 pounds of mower and parts that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 58 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 30th day of March, 1911, said plaintiff's assignor was

compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $10.70; that said property was covered by defendant's waybill No. 23,535; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $2.86 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[50]**

Cause of Action No. 51.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under

and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Delano, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 30th day of September, 1911, at the

said City of Los Angeles, Pacific Hardware & Steel Co. delivered to defendant for transportation from said City of Los Angeles to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 2284 pounds of galvanized iron that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 55 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 2 day of October, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $12.56; that said property was covered by defendant's waybill No. 25,412; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $3.99 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of prop-

erty from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. **[51]**

Cause of Action No. 52.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and

property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Delano, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1 day of September, 1911, at the said City of Los Angeles, Pacific Hardware & Steel Co., delivered to defendant for transportation from said City of Los Angeles to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 2012 pounds of galvanized iron; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant

for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 55 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 4 day of September, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $11.07; that said property was covered by defendant's waybill No. 434; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $3.60 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plain-

tiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a citizen of the State of California. [52]

Cause of Action No. 53.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes

through the station of Tehachapi, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 25 day of September, 1911, at the said City of Los Angeles, Baker & Hamilton delivered to defendant for transportation from said City of Los Angeles to Chas. Asher, hereinafter called plaintiff's assignor, at said station of delivery, 1590 pounds of wagon (knocked down); that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 58 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported

by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 27 day of September, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $9.32; that said property was covered by defendant's waybill No. 20,717; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $2.46 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [53]

Cause of Action No. 54.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said city of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property of said railroad, and at all said times was a common carrier of persons

and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 13th day of March, 1911, at the said point of shipment, Rosenblat Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 855 pounds of wine; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 110 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 60 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 15th day of March, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $9.41; that said property was covered by defendant's waybill No. 8326; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum

of $4.27 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [54]

Cause of Action No. 55.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein men-

tioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Delano, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 11th day of March, 1911, at the said point of shipment, Pacific Hardware & Steel Co. delivered to defendant for transportation from said point of shipment to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 1805 pounds of sheet iron; that said defendant transported said property from said point of shipment to

said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 62 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 14th day of March, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $11.19; that said property was covered by defendant's waybill No. 12,459; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $4.42 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of

plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is and at all times in this complaint mentioned was, a citizen of the State of California. **[55]**

Cause of Action No. 56.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times

herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Delano, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1st day of May, 1911, at the said point of shipment, Holbrook, Merrill & Stetson delivered to defendant for transportation from said point of shipment to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 2644 pounds of sheet iron; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 62 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of ship-

ment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 4th day of May, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $16.39; that said property was covered by defendant's waybill No. 88; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.37 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is and at all times in this complaint mentioned was, a citizen of the State of California. [56]

Cause of Action No. 57.

For another, further and separate cause of action

against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Delano, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad,

and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 15th day of May, 1911, at the said point of shipment, Pacific Hardware & Steel Co. delivered to defendant for transportation from said point of shipment to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 1700 pounds of pipe; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 62 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 17th day of May, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $10.54; that said property was covered by defendant's waybill No. 18,041; that the said payment so

made, and the said charges so exacted by defendant exceeded by the sum of $4.16 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is and at all times in this complaint mentioned was, a citizen of the State of California. [57]

Cause of Action No. 58.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein men-

tioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of San Luis Obispo hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 17th day of May, 1911, at the said City of Los Angeles, Lacy Mfg. Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Dome Oil Co., at said station of delivery 87,800 pounds of tank iron; that defendant then and there demanded that plaintiff's assignor pay to defendant for the

transportation of said property from said City of Los Angeles to said station of delivery the sum of 27½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 17 ½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $241.45; that said property was covered by defendant's waybill No. T. L. 13,218, that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $87.80 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of

plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

[58]

Cause of Action No. 125.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Fran-

cisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of San Luis Obispo hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 4th day of May, 1911, at the said City of Los Angeles, Lacy Manufacturing Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Dome Oil Co. at said station of delivery 97,900 pounds of iron tank material; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 27½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 17½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did

pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $269.23; that said property was covered by defendant's waybill No. T. L. 2549; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $97.90 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

**[59]**

Cause of Action No. 60.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned

was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 25 day of March, 1911, at the said City of Los Angeles, Wilson and Willard, hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Boles Pump Co. at said station of delivery 6580 pounds of working barrels; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 58 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $38.16; that said property was covered by defendant's waybill No. 23,280; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $10.68 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that

plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.
[60]

Cause of Action No. 61.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and prop-

erty within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of San Luis Obispo, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8th day of May, 1911, at the said City of Los Angeles, Lacy Mfg. Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Dome Oil Co., at said station of delivery, 77,400 pounds of tank iron; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 27½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant

charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 17½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $212.85; that said property was covered by defendant's waybill No. T. L. 5136; that said defendant thereuopn transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $77.40 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plain-

tiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [61]

Cause of Action No. 62.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Exeter hereinafter called the station of delivery; that said City of San Francisco

is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 13th day of February, 1911, at the said City of Los Angeles, Lacy Mfg. Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to F. H. Whipple Machine Co., at said station of delivery, 20,000 pounds of steel riveted pipe; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 56 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 27½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $112.00; that said property was covered by defendant's waybill No. T. L.

9540; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $57.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [62]

Cause of Action No. 63.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District

of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of San Francisco is more distant from said city of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 24th day of July, 1911, at the said City of Los Angeles, Union Tool Co., hereinafter called plaintiff's assignor, delivered to defendant for trans-

portation from said City of Los Angeles to Union Tool Co., at said station of delivery, 36,000 pounds of bar iron; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 27½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 25 cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $99.00; that said property was covered by defendant's waybill No. T. L. 19,525; that said defendant thereupon transported said property to said station of delivery; that said payment so made, and the said charges so exacted by defendant exceeded by the sum of $9.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. **[63]**

Cause of Action No. 64.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff, is and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 12th day of May, 1911, at the said City of Los Angeles J. F. Lucy Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to J. F. Lucy Co. at said station of delivery 36,380 pounds of oil well supplies; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 40 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 30 cents per hundred pounds;

that in order to obtain the transportation of said property to said station of delivery; and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $145.52; that said property was covered by defendant's waybill No. 9147; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $36.38 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

[64]

Cause of Action No. 65.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the

occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8th day of August, 1911, at the said City of Los Angeles, J. F. Lucey Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles, to J. F. Lucey Co., at said station of delivery, 8250 pounds of boiler shell that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 67 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 60 cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $55.28; that said property was covered by defendant's waybill No. 14,662; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so extracted by defendant exceeded by

the sum of $5.77 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [65]

Cause of Action No. 66.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Emery, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 29th day of August, 1911, at the said point of shipment, Judson Mfg. Co. delivered to defendant for transportation from said point of shipment to J. H. Burnett, hereinafter called plaintiff's assignor, at said station of delivery, 43,062

pounds of bar iron; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 15 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 29th day of August, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $155.03; that said property was covered by defendant's waybill No. 1014; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $90.43 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action

plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. [66]

Cause of Action No. 67.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Emery, in said State, herein after called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 26th day of August, 1911, at the said point of shipment, Judson Mfg. Co. delivered to defendant for transportation from said point of shipment to J. H. Burnett, hereinafter called plaintiff's assignor, at said station of delivery, 38,030 pounds of bar iron; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the

transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 15 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 29th day of August, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $136.91; that said property was covered by defendant's waybill No. 1075; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $79.86 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen

of the State of California. [67]

Cause of Action No. 68.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times

herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1st day of February, 1911, at the said City of Los Angeles, Axelson Machine Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Axelson Machine Co. at said station of delivery 41,140 pounds of oil well supplies; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 50 cents per hundred pounds; that at said time and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 30 cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $205.70; that said property was covered by defendant's waybill No. 57; that said defendant thereupon transported said property to said station of delivery; that the said payment

so made, and the said charges so exacted by defendant exceeded by the sum of $82.28 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [68]

Cause of Action No. 69.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 13th day of May, 1911, at the said City of Los Angeles Axelson Machine Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Axelson Machine Co. at said station of delivery

32,400 pounds of oil well supplies; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 40 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 30 cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $129.60; that said property was covered by defendant's waybill No. 10,308; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $32.40 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action

plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [69]

Cause of Action No. 70.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times

herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 22d day of April, 1911, at the said City of Los Angeles Axelson Machine Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Axelson Machine Co. at said station of delivery 3940 pounds of working barrels; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 58 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the de-

livery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $22.85; that said property was covered by defendant's waybill No. 18,895; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $6.11 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. **[70]**

Cause of Action No. 71.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said rail-

road; that said railroad is entirely within the State of California.

IV.

That on the 27th day of July, 1911, at the said City of Los Angeles Axelson Machine Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Axelson Machine Co., at said station of delivery 6720 pounds of working barrels; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 58 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $38.98; that said property was covered by defendant's waybill No. 123,543; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $10.41 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the

same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.
[71]

Cause of Action No. 72.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Ken-

tucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 10th day of August, 1911, at the said City of Los Angeles Axelson Machine Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Axelson Machine Co. at said station of delivery 4920 pounds of working barrels; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said

station of delivery the sum of 58 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property to wit, the sum of $28.54; that said property was covered by defendant's waybill No. 5601; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $7.62 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this ac-

tion plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [72]

Cause of Action No. 73.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes

through the station of Bakersfield hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 24th day of March, 1911, at the said City of Los Angeles Axelson Machine Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Axelson Machine Co. at said station of delivery 10,550 pounds of sucker rods; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 53 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to

wit, the sum of $55.92; that said property was covered by defendant's waybill No. 20,486; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $16.35 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [73]

Cause of Action No. 74.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California;

that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 24th day of March, 1911, at the said

City of Los Angeles, J. F. Lucey Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to J. F. Lucey Co. at said station of delivery 5535 pounds of pig iron; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 58 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $32.10; that said property was covered by defendant's waybill No. 22,188; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $8.58 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue

of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. [74]

Cause of Action No. 75.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said District.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 25th day of July, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery, 24,700 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per

hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 27th day of July, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $92.63; that said property was covered by defendant's waybill No. 28,436; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.87 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this

complaint mentioned was, a citizen of the State of California. [75]

Cause of Action No. 76.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of

delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 12th day of July, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery 24,700 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 14th day of July, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transpor-

tation of said property, to wit, the sum of $92.63; that said property was covered by defendant's way-bill No. 13,169; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.87 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. [76]

Cause of Action No. 77.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a

resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 12th day of June, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery 24,600

pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 14th day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $92.25; that said property was covered by defendant's waybill No. 14,480; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.65 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set

over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. [77]

Cause of Action No. 78.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times

herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 3d day of June, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery 24,700 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the

said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit on the 15th day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $92.63; that said property was covered by defendant's waybill No. 3914; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.87 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. [78]

Cause of Action No. 79.

For another, further and separate cause of action

against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said

railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 7 day of June, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery, 24,500 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles, the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 9th day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $91.88; that said property was covered by defendant's waybill No. 8270; that the said payment so

made, and the said charges so exacted by defendant exceeded by the sum of $30.62 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. **[79]**

Cause of Action No. 80.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 20th day of June, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery, 25,140

pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles, the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 22d day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $94.28; that said property was covered by defendant's waybill No. 25,253; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $31.62 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action

plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. [80]

Cause of Action No. 81.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 9th day of May, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery, 24,500 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for

the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles, the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 11th day of May, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $91.88; that said property was covered by defendant's waybill No. 10,763; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.62 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. **[81]**

Cause of Action No. 82.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of trans-

porting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 29th day of April, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery, 24,700 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 1st day of May, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit the sum of $92.63; that said property was covered by

defendant's waybill No. 35,250; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.87 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. [82]

Cause of Action No. 83.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 28th day of June, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery, 24,900 pounds of beer; that said defendant trans-

ported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 31st day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit the sum of $93.37; that said property was covered by defendant's waybill No. 35,827; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $31.13 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and

set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. [83]

Cause of Action No. 84.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 24th day of June, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery, 24,800 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant

charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 26th day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit the sum of $93.00; that said property was covered by defendant's waybill No. 31,636; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $31.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this

complaint mentioned was, a citizen of the State of California. [84]

Cause of Action No. 85.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned, operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Bakersfield, hereinafter called the station of delivery; that said City of Los Angeles is more distant

from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 19th day of June, 1911, at the said point of shipment, J. Wieland Brewing Company delivered to defendant for transportation from said point of shipment to R. McDonald, hereinafter called plaintiff's assignor, at said station of delivery, 24,500 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 21st day of June, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so

demanded by defendant for the transportation of said property, to wit, the sum of $91.88; that said property was covered by defendant's waybill No. 23,731; that the said payment so made; and the said charges so exacted by defendant exceeded by the sum of $30.62 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demanded of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. [85]

Cause of Action No. 86.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of

California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 16th day of February, 1912, at the said City of Los Angeles Axelson Machine Co., hereinafter called plaintiff's assignor, delivered to defend-

ant for transportation from said City of Los Angeles to Axelson Machine Co. at said station of delivery; 10,785 pounds of sucker and fittings; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 53 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said propery to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $57.16; that said property was covered by defendant's waybill No. 10,991; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $16.72 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commisison has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. [86]

Cause of Action No. 87.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Bakersfield hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 11th day of November, 1911, at the said City of Los Angeles, Axelson Machine Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Axelson Machine Co., at said station of

delivery 37,380 pounds of oil well supplies; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 40 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 30 cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $149.52; that said property was covered by defendant's waybill No. 8182; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $37.38 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action

plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. [87]

Cause of Action No. 88.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing

under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Exeter, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery. That at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 4th day of November, 1911, at the said City of Los Angeles, Lacy Mfg. Co., hereinafter called plaintiff's assignor, delivered to defendant for transportation from said City of Los Angeles to Geo. F. Stevenson, at said station of delivery 13,550 pounds of tank iron; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said

City of Los Angeles to said station of delivery the sum of 57 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 37½ cents per hundred pounds; that in order to obtain the transportation of said property to said station of delivery, and at the time of the delivery of said property to defendant, plaintiff's assignor was compelled to pay, and did pay, to defendant the said charges so demanded by defendant for the said transportation of said property, to wit, the sum of $77.24; that said property was covered by defendant's waybill No. 2,666; that said defendant thereupon transported said property to said station of delivery; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $26.42 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco; that plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said ex-

cessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. [88]

Cause of Action No. 89.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said de-

fendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Delano, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 3 day of January, 1912, at the said point of shipment, Pacific Hardware & Steel Co. delivered to defendant for transportation from said point of shipment to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 1830 pounds of sheet iron and fittings; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there

depanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 62 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of $37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 5 day of January, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $11.35; that said property was covered by defendant's waybill No. 2242; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $4.48 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that de-

fendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. That plaintiff's assignor is and at all times in this complaint mentioned was a citizen of the State of California. [89]

Cause of Action No. 90.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said de-

fendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Delano, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8 day of March, 1912, at the said point of shipment, Baker and Hamilton delivered to defendant for transportation from said point of shipment to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 2423 pounds of iron and fittings; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plain-

tiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 62 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 11 day of March, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for,the transportation of said property, to wit, the sum of $15.02; that said property was covered by defendant's waybill No. 18,298; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.93 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plain-

tiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. That plaintiff's assignor is and at all times in this complaint mentioned was a citizen of the State of California. **[90]**

Cause of Action No. 91.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and prop-

erty within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Delano, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 15 day of April,, 1912, at the said point of shipment, Deere Manufacturing Co. delivered to defendant for transportation from said point of shipment to W. C. Brunner, hereinafter called plaintiff's assignor, at said station of delivery, 2080 pounds of iron; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property

from said point of shipment to said station of delivery the sum of 62 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 37½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 18 day of April, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $12.90; that said property was covered by defendant's waybill No. 20,655; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.09 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That

defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. That plaintiff's assignor is, and at all times in this complaint mentioned was, a citizen of the State of California. [91]

Cause of Action No. 92.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 29 day of January, 1912, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 24,000 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per

hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 1 day of February, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $90.00; that said property was covered by defendant's waybill No. 32,912; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. That plaintiff's assignor is, and at all times in this complaint mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [92]

Cause of Action No. 93.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 30 day of April, 1912, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 25,000 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 37½ cents per hundred

pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 3 day of May, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $93.75; that said property was covered by defendant's waybill No. 41,430; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $31.25 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [93]

Cause of Action No. 94.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 23 day of December, 1911, at the said point of shipment, Overland Freight & Transfer Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 1000 pounds of whiskey; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 103 cents per

hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 48½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 28 day of December, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $10.30; that said property was covered by defendant's waybill No. 31,017; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.50 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [94]

Cause of Action No. 95.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said

times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 4 day of November, 1911, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 24,350 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to

said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 9 day of November, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $91.31; that said property was covered by defendant's waybill No. 3645; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.44 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [95]

Cause of Action No. 96.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said

times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 4 day of June, 1912, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 29,720 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to

said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 7th day of June, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $111.45; that said property was covered by defendant's waybill No. 3900; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $37.15 (hereinafter called said excessive charge), the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[96]**

Cause of Action No. 97.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said

times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Mojave, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 29 day of February, 1912, at the said point of shipment, John Wieland Brewing Co. delivered to defendant for transportation from said point of shipment to John Cross, hereinafter called plaintiff's assignor, at said station of delivery, 24,400 pounds of beer; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to

said station of delivery the sum of 37½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 25 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 5 day of March, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $91.50; that said property was covered by defendant's waybill No. 35,003; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $30.50 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [97]

Cause of Action No. 98.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Tehachapi, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8 day of December, 1911, at the said City of Los Angeles, Standard Oil Co. delivered to defendant for transportation from said City of Los Angeles to Charles Asher, hereinafter called plaintiff's assignor, at said station of delivery, 2852 pounds of refined oil; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 58

cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 42 ½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 10 day of December, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $16.54; that said property was covered by defendant's waybill No. 4353; that the said payment so made, and the said charges so exacted by defendant exceeeded by the sum of $4.42 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to

plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. **[98]**

Cause of Action No. 99.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 1 day of December, 1911, at the said City of Los Angeles, Pioneer Paper Co. delivered to defendant for transportation from said City of Los Angeles to Fresno Planing Mill Co., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of paper that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 52

cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 27 ½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 5 day of December, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $208.00; that said property was covered by defendant's waybill No. 99; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $98.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant

pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. [99]

Cause of Action No. 100.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 11th day of June, 1912, at the said City of Los Angeles, Pioneer Paper Co. delivered to defendant for transportation from said City of Los Angeles to Fresno Planing Co., hereinafter called plaintiff's assignor, at said station of delivery, 36,770 pounds of roofing that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 43 cents per

hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 17th day of June, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $158.11, that said property was covered by defendant's waybill No. 5300; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $56.99 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defend-

ant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. **[100]**

Cause of Action No. 101.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 3 day of January, 1912, at the said City of Los Angeles, Monarch Sign Co. delivered to defendant for transportation from said City of Los Angeles to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 4150 pounds of beeswax, that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 79 cents per

hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 60 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 5 day of January, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $32.79; that said property was covered by defendant's waybill No. 228; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $7.88 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defend-

ant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. **[101]**

Cause of Action No. 102.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Los Angeles in said State to the City of San Francisco in said State, which railroad from said City of Los Angeles to said City of San Francisco passes through the station of Fresno, hereinafter called the station of delivery; that said City of San Francisco is more distant from said City of Los Angeles than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 19 day of February, 1912, at the said City of Los Angeles, Baker Iron Works, delivered to defendant for transportation from said City of Los Angeles to Valley Foundry & Machine Works, hereinafter called plaintiff's assignor, at said station of delivery, 3095 pounds of boiler and front; that said defendant transported said property from said City of Los Angeles to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said City of Los Angeles to said station of delivery the sum of 79 cents per hundred pounds; that at said

time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said City of Los Angeles to the said City of San Francisco the sum of 60 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 25 day of February, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $24.45; that said property was covered by defendant's waybill No. 12,841; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.88 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said City of Los Angeles to the said City of San Francisco. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's

assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. **[102]**

Cause of Action No. 103.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting

for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Paraffin in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 10 day of February, 1912, at the said point of shipment, Paraffin Paint Co. delivered to defendant for transportation from said point of shipment to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 31,050 pounds of roofing; that said defendant transported said property from said point of shipment to said station of delivery; and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiffs' assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents

per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 12 day of February, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $111.78; that said property was covered by defendant's waybill No. 104; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $26.39 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that de-

fendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. [103]

Cause of Action No. 104.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said

times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Livny in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Sanger, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 25 day of April, 1912, at the said point of shipment, California Wine Ass'n delivered to defendant for transportation from said point of shipment to Coblentz Bros. Co., hereinafter called plaintiff's assignor, at said station of delivery, 39,680 pounds of sulphur; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to

said station of delivery the sum of 22½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 15 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 25 day of April, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $84.32; that said property was covered by defendant's waybill No. 26; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $29.76 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that de-

fendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. **[104]**

Cause of Action No. 105.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said

times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Paraffin in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 16 day of October, 1911, at the said point of shipment, Paraffin Paint Co. delivered to defendant for transportation from said point of shipment to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 38,749 pounds of roofing; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment

to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 19 day of October, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $139.49; that said property was covered by defendant's waybill No. 2718; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $32.94 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles. That plaintiffs' assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of

this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. **[105]**

Cause of Action No. 106.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and prop-

erty within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Paraffin in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 10 day of November, 1911, at the said point of shipment, Paraffin Paint Co. delivered to defendant for transportation from said point of shipment to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 30,427 pounds of roofing; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the

transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 14 day of November, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $109.54; that said property was covered by defendant's waybill No. 3022; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $25.86 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive

charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. [106]

Cause of Action No. 107.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and prop-

erty within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Paraffin in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 15th day of March, 1912, at the said point of shipment, Paraffin Paint Co. delivered to defendant for transportation from said point of shipment to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 30,102 pounds of roofing; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transporta-

tion of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 18th day of March, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $108.37; that said property was covered by defendant's waybill No. 162; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $25.59 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive

charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. [107]

Cause of Action No. 108.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and prop-

erty within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Paraffin in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 10 day of January, 1912, at the said point of shipment, Paraffin Paint Co. delivered to defendant for transportation from said point of shipment to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 30,012 pounds of roofing paint; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the trans-

portation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 12 day of January, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $108.04; that said property was covered by defendant's waybill No. 73; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $25.51 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's

assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [108]

Cause of Action No. 109.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said de-

fendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of Leslie in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Sanger, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 26 day of February, 1912, at the said point of shipment, C. E. Whitney delivered to defendant for transportation from said point of shipment to Coblentz Bros. Co., hereinafter called plaintiff's assignor, at said station of delivery, 32,465 pounds of salt; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plain-

tiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 18½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 15 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 1 day of March, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $60.00; that said property was covered by defendant's waybill No. 40; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $11.36 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's

assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [109]

Cause of Action No. 110.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said de-

fendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Sanger, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8th day of December, 1911, at the said point of shipment, American Steel & Wire Co. delivered to defendant for transportation from said point of shipment to Coblentz Bros. Co., hereinafter called plaintiff's assignor, at said station of delivery, 7605 pounds of fencing; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that

plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 49 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 42½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 10th day of December, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $37.26; that said property was covered by defendant's waybill No. 9134; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $4.94 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant

pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for short distances for the transportation of property; that said railroad commision has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [110]

Cause of Action No. 111.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is, and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said de-

fendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Sanger, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 20th day of October, 1911, at the said point of shipment, Haas Bros. delivered to defendant for transportation from said point of shipment to Coblentz Bros. Co., hereinafter called plaintiff's assignor, at said station of delivery, 8000 pounds of beans; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's as-

signor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 49 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 42 ½ cents per hundred pounds; that in order to obtain possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 23d day of October, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $39.20; that said property was covered by defendant's waybill No. 21,814; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.20 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excesssve charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's

assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul. That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[111]**

Cause of Action No. 112.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant

was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 21 day of December, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded

that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 23 day of December, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 2175; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that de-

fendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [112]

Cause of Action No. 113.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and all times herein mentioned was, a corporation organized and existing under and

by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 8 day of December, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified

plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 11 day of December, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 712; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said exces-

sive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [113]

Cause of Action No. 114.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 11 day of December, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 712; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said exces-

sive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[113]**

Cause of Action No. 114.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 10 day of November, 1911, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery,

40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 14 day of November, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 1312; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action

plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[114]**

Cause of Action No. 115.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of

California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco, in said State, hereinafter called the point of shipment, to the City of Los Angeles, in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 4 day of May, 1912, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said

point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 6 day of May, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 423; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[115]**

Cause of Action No. 116.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California;

that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 19 day of January, 1912, at the said

point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles, the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 24 day of January, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 1770; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the

said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[116]**

No. 2643

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

# Transcript of Record.

**(IN TWO VOLUMES.)**

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Defendant in Error.

**VOLUME II.**

**(Pages 321 to 545, Inclusive.)**

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.



Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2643

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Defendant in Error.

**VOLUME II.**
**(Pages 321 to 545, Inclusive.)**

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Cause of Action No. 117.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said de-

fendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 4 day of November, 1911, at the said point of shipment, Western Building Material Co. delivered to defendant for transportation from said point of shipment to Madary's Planing Mill, hereinafter called plaintiff's assignor, at said station of delivery, 11,680 pounds of lathes; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 47 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 42½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 6 day of November, 1911, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to

wit, the sum of $54.90; that said property was covered by defendant's waybill No. 4098; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $5.26 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for a longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. **[117]**

Cause of Action No. 118.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said de-

fendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 22 day of March, 1912, at the said point of shipment, Geo. H. Tay Co. delivered to defendant for transportation from said point of shipment to Valley Foundry & Machine Works, hereinafter called plaintiff's assignor, at said station of delivery, 24,000 pounds of steel pulleys & bushings; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 33½ cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 30 cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 23d day of March, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property,

to wit, the sum of $80.40; that said property was covered by defendant's waybill No. 28,569; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $8.40 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

VI.

That defendant has never been in any case authorized by the railroad commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said railroad commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the constitution of California to charge less for the longer than for the shorter haul.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [118]

Cause of Action No. 119.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said

defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 6 day of March, 1912, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter called plaintiff's assignor, at said station of delivery, 40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 8 day of March, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said prop-

erty, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 515; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and ex- of California. **[119]**

Cause of Action No. 120.

For another, further and separate cause of action against said defendant said plaintiff alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that its principal place of business is, and at all times herein mentioned was, in the Northern District of California; that plaintiff is and at all times was

a resident of said district.

II.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Kentucky. That at all times herein mentioned said defendant was a common carrier of persons and property within the State of California, and at all said times was engaged in the occupation of transporting for hire persons and property by railroad within said State.

III.

That said defendant operates, and at all times herein mentioned operated, a railroad from the City of San Francisco in said State, hereinafter called the point of shipment, to the City of Los Angeles in said State, which railroad from said point of shipment to said City of Los Angeles passes through the station of Fresno, hereinafter called the station of delivery; that said City of Los Angeles is more distant from said point of shipment than said station of delivery; that at all times herein mentioned said defendant was engaged in the occupation of transporting for hire persons and property by said railroad, and at all said times was a common carrier of persons and property by said railroad; that said railroad is entirely within the State of California.

IV.

That on the 29 day of September, 1912, at the said point of shipment, North American Mercantile Co. delivered to defendant for transportation from said point of shipment to Kamikawa Bros., hereinafter

called plaintiff's assignor, at said station of delivery, 40,000 pounds of rice; that said defendant transported said property from said point of shipment to said station of delivery, and thereupon notified plaintiff's assignor that said property was ready for delivery; that defendant then and there demanded that plaintiff's assignor pay to defendant for the transportation of said property from said point of shipment to said station of delivery the sum of 36 cents per hundred pounds; that at said time, and at all times in this paragraph mentioned, defendant charged for the transportation in the same direction of the same class of property from said point of shipment to the said City of Los Angeles the sum of 27½ cents per hundred pounds; that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor, to wit, on the 2 day of October, 1912, said plaintiff's assignor was compelled to pay and did pay to said defendant the said charges so demanded by defendant for the transportation of said property, to wit, the sum of $144.00; that said property was covered by defendant's waybill No. 3837; that the said payment so made, and the said charges so exacted by defendant exceeded by the sum of $34.00 (hereinafter called said excessive charge) the charge then made by defendant for the transportation in the same direction of the same amount and class of property from the said point of shipment to the said City of Los Angeles.

V.

That prior to the commencement of this action plaintiff's assignor duly assigned, transferred and set over unto plaintiff the said claim and demand of plaintiff's assignor for the recovery of said excessive charge. That prior to the commencement of this action plaintiff demanded of defendant that defendant pay to plaintiff, as the assignee of said plaintiff's assignor, the amount of said excessive charge. That defendant has not paid the same or any part thereof.

That plaintiff's assignor is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California. [120]

WHEREFORE, plaintiff prays judgment against defendant for the sum of three thousand and ninety-six and 65/100 dollars ($3096.65); for interest on each excessive charge at the rate of seven per cent per annum from the date of payment thereof to date; and for its costs of suit.

HOEFLER, COOK, HARWOOD & MORRIS,

Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

P. R. Thompson, being duly sworn, deposes and says: That he is an officer, to wit, the secretary of California Adjustment Company, a corporation, the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge.

P. R. THOMPSON.

Subscribed and sworn to before me this 14th day of January, 1913.

[Seal] W. H. PYBURN.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed January 14th, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [121]

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*In the District Court of the United States, in and for the Northern District of California.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Answer.**

Now comes Southern Pacific Company, defendant in the above-entitled action, and answering plaintiff's complaint filed herein admits, denies and avers as follows:

I.

Defendant admits that at all times in the complaint mentioned it was a common carrier of persons and property by steam railroad from the City of San Francisco in the State of California to the City of Los Angeles, in the State of California, its rail line passing through the points referred to in

the complaint as stations of delivery, and that it was also such common carrier by rail from said City of Los Angeles to said City of San Francisco through said stations of delivery. Defendant denies that its railroad is entirely within the State of California, and in that behalf alleges that its said railroad line between the City of San Francisco and the City of Los Angeles forms, and at all times stated in said complaint formed, a component, integral and essential part of an interstate system of steam railroads, connected one with the other, acquired, held, [122] maintained and operated by said defendant as a unit and as an interstate system for the transportation of freight and passengers in interstate and intrastate commerce within the States of Oregon, California, Nevada, Utah, Arizona and New Mexico, and as a system for the transportation of freight and passengers in interstate commerce between and among said last-named States and each and all of them.

II.

Answering the allegations of paragraph IV of each of plaintiff's separately stated causes of action to the effect that plaintiff's assignors were compelled to pay said charges, defendant denies that plaintiff's assignors were compelled to pay said charges, and in this behalf defendant avers that said charges were paid by said plaintiff's assignors without protest. In this behalf defendant admits, in relation to the charges referred to in paragraphs IV of causes of actions 1 to 57 both inclusive, 66, 67, 75 to 85, both inclusive, and 89 to 120, both inclusive, that it would not have delivered said property to plaintiff's as-

signors if said charges demanded by defendant had not been paid; and defendant admits in relation to the charges referred to in paragraphs IV of causes of action 58 to 65, both inclusive, 68 to 74, both inclusive, and 86 to 88, both inclusive, that it would not have transported said property if said charges demanded by defendant had not been paid.

III.

Defendant denies that any charge collected by it for the transportation of the property described in paragraph IV of each of plaintiff's separately stated causes of action was in excess of the charge then made by defendant for the transportation in the same direction of the same class of property from said points of shipment either to the City of Los Angeles, or to the City of San Francisco, it being the intent of this denial to admit that [123] the charges so collected by defendant for the transportation of said property exceeded by the amounts alleged in each separately stated cause of action the charges then made by defendant for the transportation in the same direction from the point of shipment either to the City of Los Angeles or the City of San Francisco of property of the same kind and physical characteristics and described as the same class in the rate sheets and tariffs of defendant; but to deny that said property then transported from said points of shipment either to the City of Los Angeles or the City of San Francisco is of the same class as the property transported from the points of shipment upon which said charges were collected, as alleged in the complaint, because of the fact that

the charges then made by defendant for the transportation from San Francisco to Los Angeles, or from Los Angeles to San Francisco, of property of the same kind and physical characteristics and described as the same class in the rate sheets and tariffs of defendant as that transported by defendant, as stated in the complaint, to points between San Francisco and Los Angeles were forced down and controlled by actual competition by water between San Francisco and Los Angeles; and that for this reason the property transported by defendant as alleged in the complaint was not property of the same class as the property on which lower through rates from San Francisco to Los Angeles or from Los Angeles to San Francisco were then charged by defendant.

IV.

Defendant denies that it has never been in any case authorized by the Railroad Commission of the State of California to charge less for longer than for shorter distances for the transportation of property; and in that behalf alleges that in each case stated in said complaint where for the transportation of property it charged more for the shorter distance than for the longer distance, in the same direction, of the same amount [124] and class of property, it had been expressly so authorized to do by said Railroad Commission.

V.

Defendant denies that said Railroad Commission of the State of California has never prescribed that defendant might, in any case whatsoever, be relieved

to any extent from the prohibition of the Constitution of the State of California to charge less for the longer than for the shorter haul, and in that behalf alleges that in the case of all of the shipments described in said complaint as having moved or having been delivered after October 10, 1911, the said Railroad Commission had prescribed, by an order duly given and made, that the defendant might be relieved from the prohibition of the Constitution of California against charging less for the longer than for the shorter haul.

VI.

Defendant denies that any charge collected by it as alleged in paragraph IV of each of plaintiff's separately stated causes of action exceeded by any amount whatsoever the charge then made by defendant for the transportation in the same direction of the same class of property from the City of Los Angeles to the City of San Francisco, or from the City of San Francisco to the City of Los Angeles The words "class of property," used in this denial, are used in the same sense as they are used in and explained by paragraph III of this answer.

FOR A FIRST FURTHER AND SEPARATE DEFENSE, defendant states that at all the times mentioned in said complaint it was operating and now operates a steam railroad for the transportation of freight and passengers between the City of San Francisco and the City of Los Angeles, which said railroad passed and passes through the points called by the complainant "intermediate." [125] That the City of San Francisco is and at all the times

mentioned in said complaint was situated on tide-water, and that defendant's freight terminal in the City of Los Angeles is and at all the times mentioned in said complaint was situated within a comparatively short distance from tide-water, and connected therewith by rail so that common carriers by water competed freely with defendant in the carriage of freight between San Francisco and the City of Los Angeles, of each and all of the properties and commodities described in paragraph IV of each of plaintiff's separately stated causes of action. That the effect of such competition by said water carriers is, and was at all the times in said complaint stated, to hold down through rates by rail between San Francisco and Los Angeles, on all of the property and commodities referred to in plaintiff's complaint, and to compel defendant to establish and maintain such through rates in competition with said water carriers and at less than a reasonable rate for the service performed. That the intermediate rates maintained by said defendant out of San Francisco toward Los Angeles by rail, and out of Los Angeles and toward San Francisco by rail, being the rates charged and collected as alleged in plaintiff's complaint, were and are reasonable rates for the service performed, and that to reduce said intermediate rates so as to comply with Section 21 of Article XII of the Constitution of California, as the same existed from 1879 until October 10, 1911, or so as to comply with said Section 21 as amended October 10, 1911, would require defendant to establish such intermediate rates at less than a reasonable compensation

for the services performed, and would deprive it of its property without due process of law, and would deprive it of the equal protection of the law, and would compel defendant to devote its property to public use at less than a reasonable return on the fair value of its property so [126] devoted.

FOR A SECOND FURTHER AND SEPARATE DEFENSE, defendant states that Section 21, Article XII, California Constitution, as the same existed from the year 1879 to October 10, 1911, is violative of the Constitution of the United States, in that, by attempting to fix rates without a hearing it deprives railroad carriers of due process of law; that if defendant herein is compelled by final judgment herein to refund to plaintiff, on account of the shipments described in plaintiff's complaint as having moved or having been delivered prior to October 10, 1911, all or any of the sums claimed by plaintiff to be excessive charges thereon, the effect and operation of said Section 21, Article XII, California Constitution, will be to have arbitrarily established said forced and compelled rates as intermediate rates against defendant, without due process of law.

FOR A THIRD FURTHER AND SEPARATE DEFENSE, defendant states that if said Section 21, Article XII, California Constitution, required the delivery of the goods mentioned in the complaint at the stations of delivery therein mentioned, at charges not exceeding the charges for the transportation of the same property in the same direction to said Los Angeles and San Francisco, respectively,

it is violative of the Constitution of the United States in that, if enforced as to any or all of plaintiff's separately stated causes of action, it would deprive the defendant of the equal protection of the law by denying it the right to meet the competition of carriers by water, which forces defendant's through rates between San Francisco and Los Angeles below a reasonable basis, as pleaded in defendant's first further and separate defense herein. [127]

FOR A FOURTH FURTHER AND SEPARATE DEFENSE, defendant states that as to the shipments specified in plaintiff's separately stated causes of action, that moved or were delivered prior to October 10, 1911, the rates collected for the transportation of each and all of them were rates established by the Railroad Commission of the State of California, pursuant to Section 22, Article XII, of the Constitution of the State of California, as it existed from 1879 to October 10, 1911; and said rates were at the time of their collection and are now conclusively just and reasonable.

FOR A FIFTH FURTHER AND SEPARATE DEFENSE, defendant states that the through rates on defendant's line of railroad from San Francisco to Los Angeles, and from Los Angeles to San Francisco, on the same kinds and quantities of property as those alleged by plaintiff to have been transported by defendant as stated in plaintiff's complaint to points intermediate San Francisco and Los Angeles, were forced down and compelled by an actual competition with carriers by water between San Fran-

cisco and Los Angeles, and that therefore the property transported by defendant to the points intermediate San Francisco and Los Angeles, as alleged in said complaint, was not property of the same class as property of the same physical character and commercially called by the same name, on which lower through rates of transportation by rail between San Francisco and Los Angeles were offered by defendant.

FOR A SIXTH FURTHER AND SEPARATE DEFENSE, defendant states that Section 71 of the Public Utilities Act of the State of California, approved December 23, 1911, and effective March 23, 1912, being Chapter 14 of the Statutes of California of the Special Session of 1911, provides as follows: **[128]**

> "(a) When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection; *provided,* no discrimination will result from such reparation.
>
> (b) If the public utility does not comply with the order for the payment of reparation within the time specified in such order, suit may be instituted in any court of competent jurisdic-

tion to recover the same. All complaints concerning excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission. The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies in this act provided in case of failure of a public utility to obey an order or decision of the commission."

That neither plaintiff nor any of its assignors, nor any person for or on behalf of plaintiff or any of its assignors, has at any time applied to the Railroad Commission of the State of California for an order of reparation under the provisions of said section, respecting any one or more or all of the shipments described in plaintiff's separately stated causes of action, and that therefore each of plaintiff's causes of action as separately stated is barred by the provisions of said Public Utilities Act, and this court has no jurisdiction to give judgment in plaintiff's favor for the whole or any part of all or any of plaintiff's causes of action.

FOR A SEVENTH FURTHER AND SEPARATE DEFENSE, defendant states that as to each and all of the shipments referred to in plaintiff's separately stated causes of action, which moved or were delivered after October 10, 1911, the Railroad Commission of the State of California, pursuant to Section 21, Article XII, California Constitution, as

amended October 10, 1911, authorized defendant, after investigation, to charge more for the shorter [129] distance to the point intermediate San Francisco and Los Angeles to which such shipment was transported than for the longer distance in the same direction.

FOR AN EIGHTH FURTHER AND SEPARATE DEFENSE, defendant states that as to each and all of the shipments mentioned in plaintiff's complaint, which moved or were delivered after October 10, 1911, the rates charged and collected thereon by defendant were rates which, prior to October 10, 1911, had been established by the Railroad Commission of the State of California, and had not at the time of their collection as aforesaid been in any manner changed.

FOR A NINTH FURTHER AND SEPARATE DEFENSE, defendant states that as to all of the shipments mentioned in plaintiff's complaint, which moved or were delivered prior to October 10, 1911, the rate charged and collected for each of said shipments, as alleged in said complaint, was the rate published by said defendant and established by the Railroad Commission of the State of California, and as to said rates and each of them there is applicable Section 40 of an act of the Legislature of the State of California, approved March 19, 1909, providing for the organization of the Railroad Commission of the State of California, and defining its powers and duties, which said section provides:

"In all actions between private parties and

transportation companies subject to the provisions of this act, in respect to any rate, charge, order, rule or regulation published as required by this act, the published rate, charge, order, rule or regulation shall be deemed to be just and reasonable, and shall not be open to controversy except in and by way of such proceedings for that purpose before the Commission and the courts as are provided for in this act."

That said Railroad Commission has never acted on or with respect to the rates collected by defendant for shipments described in the complaint as having moved prior to October 10, 1911. [130]

FOR A TENTH FURTHER AND SEPARATE DEFENSE, defendant states that each and all of the payments made by plaintiff's assignors to the defendant as specified and set forth in paragraph IV of each of plaintiff's separately stated causes of action, were made under the following circumstances:

The person, firm or corporation making such payment in each case paid the same without protest, and the amount paid by him to the defendant as alleged in said respective causes of action was collected by defendant in the belief that it was the lawful rate. The amount collected by said defendant in each of said cases was the amount specified by tariffs, which as to the shipments that moved prior to October 10, 1911, had been established by the Railroad Commission of the State of California, and as to the shipments that moved after October 10, 1911, had been established by said Railroad Commission. The

amount so paid was in each case no more than a reasonable compensation for the service performed by the defendant.

FOR AN ELEVENTH FURTHER AND SEPARATE DEFENSE, defendant states that each of the rates charged and collected by defendant as alleged in plaintiff's separately stated causes of action was when and as charged and collected a just and reasonable rate for the service performed.

FOR A TWELFTH FURTHER AND SEPARATE DEFENSE, defendant states that the railroad over which the shipments referred to in the complaint were transported was at all times mentioned in the complaint a part of a railroad system operated by defendant and was engaged in the carriage of freight and passengers in intrastate and interstate commerce. That for recovery of judgment herein plaintiff relies on Section 21 of Article XII of the Constitution of California, and particularly the provision thereof [131] known as the Long and Short Haul Clause. That the effect of the application of said clause to California intrastate shipments on defendant's rail line between San Francisco and Los Angeles would have been at all times mentioned in the complaint, and would be now, unduly to burden and interfere with the movement of freight passing over said line in interstate commerce, by subjecting it to a higher freight rate than intrastate freight of the same class and character moving between Los Angeles and San Francisco under the same circumstances said result would be brought about by reason of the fact that the through rail rates for

freight on defendant's line between San Francisco and Los Angeles were, at all times mentioned in the complaint and are now, compelled to be lower than reasonable rail rates for said service and distance, by actual competition by carriers by water between San Francisco and Los Angeles, of the same commodities. Defendant's interstate rail rates for the same commodities to and from Arizona and New Mexico points on defendant's railroad system into and out of San Francisco and Los Angeles were and are not so compelled, but are reasonable rates for the service performed, and therefore to apply said Long and Short Haul Clause between San Francisco and Los Angeles would be to subject said interstate commerce to a greater burden than intrastate commerce of the same character between San Francisco and Los Angeles, which said burden would be undue and unjust.

FOR A THIRTEENTH FURTHER AND SEPARATE DEFENSE, defendant states that neither plaintiff nor any of its assignors suffered pecuniary loss or damage by or as a direct result of any of the matters, facts, or things pleaded in plaintiff's separately stated causes of action.

WHEREFORE, defendant prays judgment that plaintiff take [132] nothing by this action, and that defendant recover its costs herein.

HENLEY C. BOOTH,
GEORGE D. SQUIRES,
Attorneys for Defendant.

WM. F. HERRIN,
E. W. CAMP,
Of Counsel. [133]

State of California,
City and County of San Francisco,—ss.

S. N. Bostwick, being first duly sworn, deposes and says: I am an officer, to wit, Assistant General Freight Agent, of the above-named defendant, and am familiar with the facts upon which the allegations and denials of the foregoing answer are based. I make this verification on behalf of said defendant. I have read the foregoing answer, and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information or belief, and as to such matters I believe it to be true.

S. N. BOSTWICK.

Subscribed and sworn to before me this 2d day of January, 1914.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California. [134]

**Stipulation [That Answer May Stand as Answer to each Cause of Action, etc.].**

IT IS HEREBY STIPULATED by and between the attorneys for the parties to the above-entitled action, that the foregoing answer may stand as an answer to each of the causes of action separately stated in plaintiff's complaint on file herein, the plaintiff, however, reserving all objections as to the sufficiency or validity of any one or more or all of the denials and allegations in the foregoing answer, as applied to any one or more or all of plaintiff's separately

stated causes of action, and reserving all objections as to the sufficiency or validity of any of the alleged further and separate defenses pleaded in said answer.

Plaintiff hereby acknowledges receipt of a copy of the foregoing answer.

Dated this 2d day of January, 1914.

HOEFLER, COOK, HARWOOD & MORRIS,

Attorneys for Plaintiff.

HENLEY C. BOOTH,
GEORGE D. SQUIRES,

Attorneys for Defendant.

The foregoing stipulation is hereby approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jan. 7, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[135]**

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*In the District Court of the United States, in and for the Northern District of California.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation.

Defendant.

**Demurrer to Answer.**

Now comes California Adjustment Company the plaintiff in the above-entitled action and demurs to the answer of defendant on file herein and for ground of demurrer specifies:

I.

That said answer does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the first alleged further and separate defense set forth in said answer and for ground of demurrer specifies.

I.

That said alleged first further and separate defense does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the second alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged second further and separate defense [136] does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the third alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged third further and separate defense does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the fourth alleged further and separate defense set forth in said answer and for

ground of demurrer specifies:

I.

That said alleged fourth further and separate defense does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the fifth alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged fifth further and separate defense does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the sixth alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged sixth further and separate defense does not state facts sufficient to constitute a defense or counterclaim. [137]

Said plaintiff demurs to the seventh alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged seventh further and separate defense does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the eighth alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged eighth further and separate defense does not state facts sufficient to constitute a de-

fense or counterclaim.

Said plaintiff demurs to the ninth alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged ninth further and separate defense does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the tenth alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged tenth further and separate defense does not state facts sufficient to constitute a defense or counterclaim. [138]

Said plaintiff demurs to the eleventh alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged eleventh further and separate defense does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the twelfth alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged twelfth further and separate defense does not state facts sufficient to constitute a defense or counterclaim.

Said plaintiff demurs to the thirteenth alleged further and separate defense set forth in said answer and for ground of demurrer specifies:

I.

That said alleged thirteenth further and separate defense does not state facts sufficient to constitute a defense or counterclaim.

WHEREFORE, plaintiff prays that this demurrer be sustained and that plaintiff be awarded judgment as prayed for by the complaint.

HOEFLER, COOK, HARWOOD & MORRIS,

ALFRED J. HARWOOD,

Attorneys for Plaintiff.

Due service and receipt of a copy of the within Demurrer this 26th day of February, 1914.

HENLEY C. BOOTH,
GEO. D. SQUIRES,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 26, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [139]

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*In the District Court of the United States, in and for the Northern District of California.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Notice of Motion [to Strike Certain Parts of Answer, etc.].**

To the Defendant in the Above-entitled Action and to Messrs. H. C. Booth and George D. Squires, its Attorneys.

You and each of you will please take notice that on Monday the second day of March, 1914, at the hour of ten o'clock A. M. or as soon thereafter as counsel can be heard, the plaintiff will move the Court for an order striking out certain parts of the answer of the defendant filed herein, a copy of which said motion is hereto annexed and made a part of this notice.

Dated February 26th, 1914.

HOEFLER, COOK, HARWOOD & MORRIS,

ALFRED J. HARWOOD,

Attorneys for Plaintiff. [140]

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*In the District Court of the United States, in and for the Northern District of California.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Motion to Strike Out Parts of Answer.**

Now comes California Adjustment Company the plaintiff in the above-entitled action and moves the Court for an order striking from the Answer of the defendant herein the following parts thereof:

1. The alleged first further and separate defense set forth in said answer.

2. The alleged second further and separate defense set forth in said answer.

3. The alleged third further and separate defense set forth in said answer.

4. The alleged fourth further and separate defense set forth in said answer.

5. The alleged fifth further and separate defense set forth in said answer.

6. The alleged sixth further and separate defense set forth in said answer.

7. The alleged seventh further and separate defense set forth in said answer.

8. The alleged eighth further and separate defense set forth in said answer. **[141]**

9. The alleged ninth further and separate defense set forth in said answer.

10. The alleged tenth further and separate defense set forth in said answer.

11. The alleged eleventh further and separate defense set forth in said answer.

12. The alleged twelfth further and separate defense set forth in said answer.

13. The alleged thirteenth further and separate defense set forth in said answer.

This motion is made upon the ground that said so-called separate defenses are, and each of them is, sham and irrelevant, and is based upon the complaint of plaintiff and the said answer of the defendant.

Dated February 26th, 1914.

HOEFLER, COOK, HARWOOD & MORRIS,

ALFRED J. HARWOOD,

Attorneys for Plaintiff.

Due service and receipt of a copy of the within Notice this 26th day of February is hereby admitted.

HENLEY C. BOOTH,

GEORGE D. SQUIRES,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 26, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [142]

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*In the District Court of the United States, in and for the Northern District of California*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Waiver of Jury.**

The parties to the above-entitled action hereby waive a trial by jury.

Dated March 2d, 1914.

HOEFLER, COOK, HARWOOD & MORRIS,

Attorneys for Plaintiff,
HENLEY C. BOOTH,
GEO. D. SQUIRES,
Attorneys for Defendant.

[Endorsed]: Filed March 2d, 1914. Walter B. Maling, Clerk. [143]

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At a stated term, to wit, the November term A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 24th day of February, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,638.

CALIFORNIA ADJUSTMENT CO.

vs.

SOUTHERN PACIFIC CO.

**Order Sustaining Demurrer in Part and Overruling Demurrer in Part.**

Plaintiff's demurrer to answer and motion to strike out parts of answer, heretofore heard and sub-

mitted being now fully considered and the Court having filed its memorandum opinion thereon, it was ordered that said demurrer be and the same is hereby sustained as to each of the several special defenses other than the seventh special defense and that said demurrer as to the seventh special defense be and the same is hereby overruled. [144]

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*In the District Court of the United States, in and for the Northern District of California*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Special Findings of Fact and Conclusion of Law.**

The above-entitled action came on regularly for trial before the above-entitled court, Hon. WILLIAM C. VAN FLEET, Judge thereof, presiding, on the 6th day of May, 1915; Alfred J. Harwood, Esq., appearing as attorney for plaintiff, and Henley C. Booth, Esq., one of the attorneys of record for defendant, appearing as attorney for defendant.

Said action was tried upon the issues arising from the original complaint of plaintiff filed herein, and original answer of defendant filed herein, as such issues were settled by the order of this court sustaining the demurrer of plaintiff to all of the separately

stated separate defenses contained in defendant's answer, except the seventh further and separate defense contained therein.

Oral and documentary evidence was introduced on behalf of the respective parties, and the evidence having been closed the cause was submitted to the Court for consideration and decision.

Special findings of fact were demanded by defendant prior to the submission of said cause.

Whereupon, said Court, being fully advised in the premises, hereby makes its special findings of fact, and, in connection [145] with the admissions of the pleadings, its conclusion of law thereon.

## FINDINGS OF FACT.

### I.

That it is not true as alleged in paragraph IV of defendant's answer that in each or any instance stated in the complaint where for the transportation of property defendant charged more for the shorter distance than for the longer distance, in the same direction, of the same amount and class of property, defendant had been so authorized to do by said Railroad Commission.

### II.

It is not true, as alleged in paragraph V of defendant's answer, that in the case of all or any of the shipments described in the complaint as having moved or having been delivered after October 10, 1911, the Railroad Commission of the State of California had prescribed, by order or otherwise, that the defendant might be relieved from the prohibition of the Constitution of the State of California against

charging less for the longer than for the shorter haul. Nor is it true, that, as alleged in defendant's seventh further and separate defense contained in its answer, that as to each and all or any of the shipments referred to in plaintiff's separately stated causes of action, which moved or were delivered after October 10, 1911, the Railroad Commission of the State of California, pursuant to Section 21, Article XII of the Constitution of the State of California, as amended October 10, 1911, or otherwise, authorized defendant, after investigation, or at all, to charge more for the shorter distance to the point between San Francisco and Los Angeles to which such shipment was transported, than for the longer distance in the same direction. [146]

III.

It is not true, as alleged in paragraph III of defendant's answer, that the property transported by defendant, as alleged in the several separately stated causes of action, was not property of the same class as the property on which lower through rates from Los Angeles to San Francisco were then being charged by defendant, but to the contrary the Court finds that such property was, in each instance, property of the same class as the property on which lower through rates were so charged.

CONCLUSION OF LAW.

As a conclusion of law from the foregoing findings of fact, taken in connection with the admissions made by the pleadings herein, as settled as aforesaid, the court hereby decides that plaintiff is entitled to judg-

ment as prayed for in its complaint.

Let judgment be entered in accordance herewith.

Done in open court this 2d day of June, 1915.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed June 2d, 1915. Walter B. Maling, Clerk. [147]

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Judgment on Findings.**

This cause having come on regularly for trial on the 5th day of May, A. D. 1915, before the Court, sitting without a jury, a trial by jury having been specially waived by stipulation filed herein; A. J. Harwood, Esq., appearing as attorney for plaintiff, and H. C. Booth, Esq., appearing as attorney for defendant; and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having filed its special findings in writing, and ordered that judgment be entered herein in

accordance therewith:

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that California Adjustment Company, a corporation, plaintiff, do have and recover of and from Southern Pacific Company, a corporation, defendant, the sum of three thousand nine hundred twenty-eight and 01/100 ($3,928.01) Dollars, together with its costs herein expended taxed at $38.70.

Judgment entered June 2, 1915.

WALTER B. MALING,
Clerk.

A True Copy. Attest:

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed June 2, 1915. Walter B.Maling, Clerk. [148]

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*In the District Court of the United States for the Northern District of California.*

No. 15,638.

CALIFORNIA ADJUSTMENT CO. a Corp.

vs.

SOUTHERN PACIFIC COMPANY, a Corp.

**Certificate of Clerk to Judgment-roll.**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 2d day of June, 1915.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed June 2, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [149]

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*In the District Court of the United States, Northern District of California, Second Division.*

CALIFORNIA ADJUSTMENT COMPANY,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

**Memorandum Opinion.**

A. J. HARWOOD and HOEFLER, COOK & HARWOOD, for Plaintiff.

H. C. BOOTH and GEORGE D. SQUIRES, for Defendant.

VAN FLEET, District Judge:

In this action, brought to recover from defendant, a common carrier, an accumulated sum of excess freight rates alleged to have been charged and collected by it from the assignors of plaintiff in violation of the so-called "long and short haul" clause of the Constitution of the State (Article 12, Section 21), the defendant has interposed thirteen separate and distinct special defenses, each of which has been

met by a demurrer and a motion to strike as constituting no valid defense. I have given the voluminous briefs and arguments for consideration, but shall content myself by stating my conclusions in a brief and general way.

(1) Logically, the sixth defense, as involving [150] the jurisdiction of the Court to entertain the action, should be first disposed of. Its allegations proceed upon the theory that the Court has no jurisdiction of the subject matter of the action because plaintiff has not applied to the Railroad Commission for a reparation order as provided in Section 71 of the Public Utilities Act of December 23, 1911, (Chapter 4, Stats. Cal., Spec. Sessn. 1911).

But this section has reference, when properly construed, only to instances where the question whether the carrier has charged an excessive or discriminatory rate is dependent upon facts to be ascertained from an investigation upon evidence taken by the Commission, as in Texas & Pacific Ry. Co. vs. Abilene etc. Co., 204 U. S. 216, and Robinson vs. B. & O. R. R., 222 U. S. 506. It can have no application to an instance where, as here, if the overcharge was made as alleged it was unwarranted as matter of law. In such case the rate "was unlawful under any pretense or for any cause" and was not a question to be referred to the Commission; (Pennsylvania R. R. Co. vs. International Coal Co., 230 U. S. 184;) but falls within the provisions of Section 73 (subdivision A) of the Utilities Act, which authorizes the aggrieved party to prosecute an action in the courts "for any loss or injury arising from a failure of the

carrier to do any act or thing required to be done by the Constitution or any law of the State or any order or decision of the Commission." This defense is therefore untenable.

(2) The first, second and third special defenses are founded upon the defendant's claim that the [151] inflexible enforcement of the provision of the State Constitution in question under the conditions pleaded would operate to deprive defendant of its property without due process of law.

But that the enforcement of such a provision by the State is not repugnant to any right guaranteed by the Constitution of the United Staes has been distinctly announced in Louisville & Nashville Railway Co. vs. Kentucky, 183 U. S. 503, involving a substantially similar provision of the Kentucky Constitution; and the doctrine has been reaffirmed by that court in the Intermountain Cases (United States vs. A. T. & S. F. Ry. Co.,), 234 U. S. 476.

These defenses are therefore not founded in substance.

(3) The fourth defense sets up that the rates obtaining prior to October 10, 1911, when the Constitutional provision was amended, were authorized by the Commission and could not be deviated from by the carrier without subjecting it to severe penalties as provided in Section 22 of the same article of the Constitution.

But the answer to this is that until the amendment of October 10, 1911, empowering the Commission to relieve carriers in special instances from the effects of the long and short haul clause the prohibition was

absolute and as obligatory upon the Commission as upon the carrier. Before that amendment the Commissionwas as powerless to fix rates in contravention of the prohibition as the carrier was to charge them; and if it assumed to do so its act was simply void and not only cast no obligation upon the carrier to obey its order but afforded no protection for such obedience. There is nothing of substance in the claim that Section 22, [152] when construed *in pari materia* with Section 21, is a limitation upon the latter or in any respect modifies the provisions of the clause in question. Obviously the rates which the Commission is empowered to fix under Section 22 are to be fixed in subordination to the prohibition found in Section 21, and it is only rates so fixed that are to be "deemed conclusively just and reasonable," either as an obligation upon or protection to the carrier. Any other interpretation of the sections would be in violation of cardinal rules of construction. This defense is therefore not well taken.

The considerations affecting the fourth defense obtain as to the material substance of the eighth and tenth defenses, which proceed upon cognate lines and therefore do not call for special notice.

(4) So far as the fifth, eleventh, twelfth and thirteenth defenses are concerned, the defendant has made no particular effort to sustain their materiality as against the objections raised by the demurrer. They need not be specifically mentioned, but it is enough to say that none of them contain any matter tending to constitute a substantive defense which is not covered by the denials of the answer.

(5) As to the seventh special defense, it sets up facts which it is conceded by plaintiff, if found to be true, would constitute a valid defense to the causes of action based upon shipment moving after October 10, 1911. [153]

It results that as to the several special defenses other than the seventh the demurrers must be sustained; as to the latter, it should be overruled. Such will be the order.

[Endorsed]: Filed Feby. 24, 1915. Walter B. Maling, Clerk. [154]

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*In the District Court of the United States, for the Northern District of California, Second Division.*

No. 15,638.

Before Hon. WM. C. VAN FLEET, Judge.

CALIFORNIA ADJUSTMENT COMPANY,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED, that on May 5, 1915, the above-entitled cause came on for hearing before Hon. WM. C. VAN FLEET, Judge of said court, a jury having been duly waived by both parties. The plaintiff appeared by Alfred J. Harwood, Esq., one of its counsel, and the defendant appeared by Henley C. Booth, Esq., one of its counsel; whereupon the following proceedings were had:

Mr. HARWOOD.—This is a complaint to recover overcharges based upon a violation of the long and short haul clause of the Constitution of California. Causes of action 1 to 85 inclusive arise under the Constitution of 1879, before the amendment of October 10, 1911, the amendment which allowed the Railroad Commission to grant relief from the operation of the prohibition.

The COURT.—Under special circumstances.

Mr. HARWOOD.—Under special circumstances. Causes of action 86 to 120 arise under the amendment to the Constitution allowing the Railroad Commission to grant relief in special cases after investigation was had; so the complaint may be divided **[155]** into these two clauses. The answer of the defendant does admit all of the material allegations of the complaint that the shipments were made, that the charges were in violation of the Constitution, and it set up 13 separate defenses. A demurrer was interposed, and your Honor sustained the demurrer to all the separate defenses except one, and in that case the plaintiff conceded that the demurrer should be overruled. That separate defense as to the cause of action arising after the amendment to the Constitution, and, as I understand it, that is the only issue which is now before the Court. That the Railroad Commission granted permission to the defendant to charge more for the shorter distance after the amendment to the Constitution of October 10, 1911, is the only special defense to which the demurrer was overruled, and that, as I see it, is the only issue before the Court at the present time. This stipula-

tion which has been introduced in evidence will relate, I think, entirely to that paritcular special defense. Although in a sense the answer attempts to deny the allegations of the complaint, yet as a matter of fact it does not; and the allegations of the complaint that the shipments were made, that there were greater charges for the shorter haul than made for the longer distance, and that payments were involuntary, that is, they were made under such circumstances that they were not voluntary payments in contemplation of law, are all admitted by the pleadings. The only matter now before the Court for determination is as to whether or not the defendant can sustain its seventh defense, and that is, that the Railroad Commission, after the amendment to the Constitution, granted relief. Of course that would apply only to the causes of action from 86 on —86 to 120. There is no defense at all alleged bearing upon the first 85 causes of action.

Mr. BOOTH.—Do I understand that the counsel has closed **[156*—2†]** his case?

Mr. HARDWOOD.—Yes.

Thereupon counsel for defendant presented to the Court and filed with the Court a written motion for nonsuit, which said motion was in words and figures as follows: **[157—3]**

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†Original Page-number of Opinion as appears in Original Certified Transcript of Record.

*Page-number appearing at foot of page of certified transcript of Record.

**Exhibit No. 1.**

*In the District Court of the United States, in and for the Northern District of California.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Motion for Nonsuit.**

Now comes the defendant above named, and after the close of said plaintiff's case, and before submitting evidence on the denials and affirmative defenses raised by defendant's answer, moves the above-entitled court for a judgment of nonsuit herein, on the following grounds:

First. That it does not appear from the evidence introduced by the plaintiff, taken in connection with the settled admissions made by the pleadings, that the charges collected by defendant and specified in paragraph 4 of each of the separately stated causes of action, and therein called excessive charges, exceeded by any sum whatever the charge then made by defendant for the transportation in the same direction of the same amount and class of property, from the point of shipment described in said paragraph 4 to the more distant point from the point

of delivery described in said paragraph 4 of each of said separately stated causes of action.

Second. That it does not appear from the evidence introduced on plaintiff's case, taken in connection with the admissions made [158—4] by defendant's pleadings, that defendant has never been in any case authorized by the Railroad Commission of the State of California to charge less for longer than for shorter distances for the transportation of property; and it does not appear from said evidence, taken in connection with said admissions, that the defendant was not, with respect to all and each of plaintiff's separately stated causes of action, authorized by the Railroad Commission of the State of California to charge less for the longer distance than for the shorter distance for which the respective charges paid by plaintiff's assignor herein were made.

Third. That it does not appear from the evidence introduced on behalf of plaintiff, taken in connection with the admissions made by defendant's pleadings, that said Railroad Commission of the State of California has never prescribed that defendant might in any case, or in any of the cases referred to in plaintiff's separately stated causes of action, be relieved from the prohibition of the Constitution of the State of California directed against charging less for the longer than for the shorter haul.

Fourth. That it affirmatively appears from plaintiff's evidence, taken in connection with the admissions made by defendant's pleadings, that plaintiff's assignors and each of them paid the amounts alleged

to have been collected by defendant, voluntarily and without protest.

Fifth. That the plaintiff has failed to show that it, or any one or more of its assignors, suffered pecuniary loss or damage by or as a direct result of any of the matters, facts, or things pleaded in plaintiff's separately stated causes of action.

Dated this 5th day of May, 1915.

(Signed) GEORGE D. SQUIRES,
(Signed) HENLEY C. BOOTH,
Attorneys for Defendant. **[159—5]**

After argument the Court denied said defendant's motion for nonsuit; whereupon and to which denial said defendant duly excepted.

**(Exception No. 1.)**

The defendant then opened its case.

**[Testimony of E. J. Reinhart, for Defendant.]**

E. J. REINHART was called as a witness for defendant, and being first duly sworn, testified as follows:

The WITNESS.—I reside in Burlingame, California, and am personal clerk to the auditor of freight accounts of defendant. The auditor of freight accounts has direct supervision of the checking of overcharges and undercharges arising under freight tariffs. The office has a complete file of the freight tariffs of the defendant so far as this case is concerned. I personally checked a corrected copy of the original complaint in this action with the original freight bills issued by defendant and in the possession of the plaintiff. The check was made for the

purpose of ascertaining on what basis the charges complained of here were made, and also to ascertain on what basis the charges would have been made if the through rate contended for by plaintiff had been applied. The result of that computation was checked with the printed tariffs on file with the Railroad Commission of the State of California, and all of the tariffs used in this check are on file with said Railroad Commission.

(Witness shown a table of calculations.)

WITNESS.—(Continuing.) This table was prepared by me, and shows all of the freight movements sued on in this action. Under column 1 it shows the date of the waybill; under column 2, the number of the waybill. The freight bills were in the possession of plaintiff, but were checked against the waybills in our possession, and the plaintiff now holds the freight bills. Columns 3, 4 and 5 show respectively the points of origin, the points of destination, and the commodity moved. Column No. 6 **[160—6]** shows the weight of the shipments. Column No. 7 shows the rate in cents collected by the defendant per hundred pounds. Column No. 8 shows the total charges collected. Column No. 9 shows the rate effective if the tariff in Column No. 10 should have been used. Column No. 10 shows the California Railroad Commission number of the Southern Pacific tariff on which the charges actually collected were based. Each tariff filed with the Commission has two numbers—the Southern Pacific number and the Commission's number, but no two tariffs have the same Southern Pacific number or the same Commission

(Testimony of E. J. Reinhart.)

number. Column No. 11 shows the through rate for the same movement and same commodity between San Francisco and Los Angeles, and Los Angeles and San Francisco, respectively; and Column No. 12 shows the total charges that would have been collected if the through rate had been observed. Column No. 13 shows the dates when the tariffs became effective according to their terms. The word "effective" is not used in the sense that I am testifying that those were the legal rates. Column 14 shows the reference by tariff number to the tariffs which would have been used in assessing the charges shown in Column 12. Column 15 shows the difference between the charges collected and the charges which would have been collected if the through tariff had been observed. The charges in all of these instances that were collected were in excess of those that would have been collected had the through rate been charged.

The third page of this tabulation contains a recapitulation showing the charges collected to have been $10,089.64, and the charges which would have been collected if the through rate had been observed, to be $6,973.49.

The tabulation shown witness Reinhart was thereupon offered in evidence by the defendant, and was objected to by plaintiff's counsel on the ground that it was irrelevant and immaterial, plaintiff's counsel waiving the objection that it was [161—7] not the best evidence, but reserving the objection that it was irrelevant and immaterial. Thereupon, after discussion, it was stipulated by plaintiff's counsel that

(Testimony of E. J. Reinhart.)

the tariff numbers in the tabulation show the tariffs under which the defendant claimed the right to make the charges contained therein, and that the tariff numbers in column 14 are the tariffs which contain the lesser charge for the longer distance referred to in the complaint, reserving the objection; and plaintiff further admitted that the charges collected by the defendant were made by the defendant upon the basis stated in the tariffs in column 10, and admitted that the lesser rates for the longer distances stated in the various causes of action and in the complaint are based upon the tariffs mentioned in column 14.

Whereupon the following statements were made:

Mr. BOOTH.—That is practically satisfactory. This will be Defendant's Exhibit "A."

Mr. HARWOOD.—If your Honor please, I don't know as to having this as an exhibit; I would like only to have it admitted as to columns 10 and 14, showing the various tariff rates only, and not for any other purpose.

The COURT.—I suppose that is all it can go in for.

Mr. BOOTH.—The rest is merely explanatory and ties it up to the complaint.

Mr. HARWOOD.—I also ask to have stricken out any reference to the causes of action occurring prior to the amendment of the Constitution. This statement covers all the causes of action in the complaint. My admission only goes to those after that.

The COURT.—I understood that to be the limit of your admission. The others are in a different category.

(Testimony of E. J. Reinhart.)

The exhibit was thereupon admitted in evidence as Defendant's Exhibit "A," with the foregoing limitation, [162—8]

Said statement is in words and figures as follows: [163—9]

STATEMENT SHOWING IN DETAIL ITEMS EMBODIED IN COMPLAINT FILED BY THE CALIFORNIA ADJUSTMENT COMPANY AGAINST THE SOUTHERN PACIFIC COMPANY, U.S.DIST. COURT N.DIST. CALIFORNIA, CASE NO.15638

| Waybill Date | Waybill No. | From | To | Commodity | Wt. | Specific Rate Collected Per 100 lbs. | Charges Collected | Date Rate Effective If Tariff In Col. 10 Should Have Been Followed | Charges Collected Were Based On Tariff No. | Thru Basis S.F. to L.A. or L.A. to S.F. Rate | Thru Basis S.F. to L.A. or L.A. to S.F. Charges | Date Through Rate Effective If Through Tariff Should Have Been Followed | Tariff Reference | Difference between Specific and Through Charges |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. | 2. | 3. | 4. | 5. | 6. | 7. | 8. | 9. | 10. | 11. | 12. | 13. | 14. | 15. |
| 9-22-11 | 25455 | San Francisco | Fresno | Castings & Fit. | 4460 | .44 | 19.62 | 6-11-09 | CRC 12 | .37½ | 16.72 | 3-22-11 | CRC 134 | 2.90 |
| 9-28-11 | 31233 | " | Bakersfield | Rope | 2073 | .72 | 14.93 | 6-11-09 | CRC 12 | .42½ | 8.82 | 3-22-11 | CRC 134 | 6.11 |
| 9-16-11 | 17303 | " | " | " | 2102 | .72 | 15.13 | 6-11-09 | CRC 12 | .42½ | 8.93 | 10-10-09 | CRC 134 | 6.20 |
| 1-24-11 | 23746 | " | " | " | 7042 | .72 | 50.70 | 6-11-09 | CRC 12 | .42½ | 29.96 | 10-10-09 | CRC 134 | 20.74 |
| 1-20-11 | 1244 | " Drumm St. | Fresno | Rice | 39400 | .36 | 141.84 | 6-11-09 | CRC 12 | .27½ | 108.35 | 10-10-09 | CRC 134 | 33.49 |
| 1-12-11 | 716 | " " | " | " | 40200 | .36 | 144.72 | 6-11-09 | CRC 12 | .27½ | 110.55 | 10-10-09 | CRC 134 | 34.17 |
| 8-18-11 | 493 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 10-10-09 | CRC 134 | 34.00 |
| 9-23-11 | 2828 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 8- 8-11 | 8987 | " | " | Pipe & Fitgs. | 4060 | .44 | 17.86 | 6-11-09 | CRC 12 | .37½ | 15.22 | 3-22-11 | CRC 134 | 2.64 |
| 4-19-11 | 21402 | " | Porterville | Rods | 5428 | .61 | 33.11 | 6-11-09 | CRC 12 | .37½ | 20.36 | 3-22-11 | CRC 134 | 12.75 |
| 8-27-11 | 3027 | " | Fresno | Rice | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 8-14-11 | 1513 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 7- 8-11 | 743 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 8- 1-11 | 116 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 4-19-11 | 1526 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 3-14-11 | 902 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 10-10-09 | CRC 134 | 34.00 |
| 1-18-11 | 17671 | " | Porterville | Raditors & Frts. | 2803 | .61 | 17.10 | 6-11-09 | CRC 12 | .37½ | 10.51 | 10-10-09 | CRC 134 | 6.59 |
| 9- 1-11 | 732 | " | Fresno | Pipe & Fitgs. | 11382 | .44 | 50.08 | 6-11-09 | CRC 12 | .37½ | 42.68 | 3-22-11 | CRC 134 | 7.40 |
| 10- 4-11 | 640 | Leslie | Sanger | Salt | 30070 | .18½ | 55.63 | 6-11-09 | Sup 1 CRC 84 CRC 12 | .15 | 45.11 | 8-15-10 | CRC 84 | 10.52 |
| 3-31-11 | 261 | Crockett | " | Sugar | 40400 | .36½ | 148.47 | (X) | CRC 12 | .27½ | 111.10 | 3-22-11 | CRC 134 | 37.37 |
| 8-29-11 | 2028 | Paraffin | Fresno | Roofing | 46534 | .36 | 167.52 | 6-11-09 | CRC 12 | .27½ | 127.97 | 3-22-11 | CRC 134 | 39.55 |
| 6- 8-11 | 1245 | " | " | " | 30062 | .36 | 108.22 | 6-11-09 | CRC 12 | .27½ | 82.67 | 3-22-11 | CRC 134 | 25.55 |
| 4- 1-11 | 65 | Livay | Sanger | Sulphur | 35000 | .21½ | 63.75 | 6-11-09 | CRC 12 | .15 | 52.50 | 6-29-08 | CRC 84 | 11.25 |
| 9-18-11 | 14005 | Los Angeles | Fresno | Lumber | 8560 | .63 | 53.93 | 2-15-11 X | CRC 134 | .37½ | 32.11 | 3-22-11 | CRC 134 | 21.82 |
| 7-27-11 | 22943 | " | " | Honey Box Lbr. | 2010 | .63 | 12.66 | 2-15-11 X | CRC 134 | .42½ | 8.54 | 3-22-11 | CRC 134 | 4.12 |
| 1-30-11 | 22157 | " | " | Roofing | 37800 | .56 | 211.68 | 10-10-09 | CRC 134 | .27½ | 103.95 | 10-10-09 | CRC 134 | 107.73 |
| 4- 1-11 | 203 | " | " | Sweeping Comp. | 8880 | .74 | 65.72 | 2-15-11 X | CRC 134 | .48½ | 43.08 | 3-22-11 | CRC 134 | 22.64 |
| 8- 9-11 | 7965 | " | " | Gasoline Eng. | 5750 | .79 | 45.43 | 2-15-11 X | CRC 134 | .60 | 34.51 | 3-22-11 | CRC 134 | 10.92 |
| 8-18-11 | 15444 | " | " | Buggs.& Shafts | 4350 | 1.18½ | 51.55 | 2-15-11 X | CRC 134 | .90 | 39.15 | 3-22-11 | CRC 134 | 12.40 |
| 8-15-11 | 11920 | " | Tehachapi | Flour | 30144 | .30 | 90.43 | 8- 3-10 | CRC 805 | .22½ | 67.82 | 8- 3-10 | CRC 805 | 22.61 |
| 1-24-11 | 17426 | " | " | Soap | 8925 | .61 | 17.84 | 10-10-09 | CRC 134 | .37½ | 10.97 | 10-10-09 | CRC 134 | 6.87 |
| 6- 8-11 | 5732 | " | Fresno | Corrug.Iron | 2970 | .53 | 15.73 | 2-15-11 X | CRC 134 | .37½ | 11.13 | 3-22-11 | CRC 134 | 4.60 |
| 7-27-11 | 23037 | " | Tehachapi | Sugar | 3529 | .53 | 18.70 | 2-15-11 X | CRC 134 | .37½ | 13.23 | 3-22-11 | CRC 134 | 5.47 |
| 8-30-11 | 25638 | " | " | Soap | 3630 | .53 | 19.24 | 2-15-11 X | CRC 134 | .37½ | 13.61 | 3-22-11 | CRC 134 | 5.63 |
| 5- 1-11 | 776 | Giant | " | Explosives | 31097 | 1.08 | 335.85 | 6-11-09 | CRC 134 | .60 | 186.58 | 3-22-11 | CRC 134 | 149.27 |
| 2-21-11 | 232 | " | " | " | 575 | 2.16 | 12.42 | 6-11-09 | CRC 134 | 1.20 | 6.90 | 10-10-09 | CRC 134 | 5.52 |
| 6-12-11 | 14476 | San Francisco | Mojave | Beer | 26350 | .37½ | 98.81 | 4-20-09 | CRC 84 | .25 | 65.87 | 7-11-09 | CRC 84 | 32.94 |
| 8-16-11 | 19266 | " | " | " | 24000 | .37½ | 90.00 | 4-20-09 | CRC 84 | .25 | 60.00 | 7-11-09 | CRC 84 | 30.00 |
| 4-21-11 | 25018 | " | " | " | 25100 | .37½ | 94.13 | 4-20-09 | CRC 84 | .25 | 62.75 | 7-11-09 | CRC 84 | 31.37 |
| 7- 7-11 | 5641 | " | " | " | 27600 | .37½ | 103.50 | 4-20-09 | CRC 84 | .25 | 69.00 | 7-11-09 | CRC 84 | 34.50 |
| 5- 4-11 | 5165 | " | " | " | 25000 | .37½ | 93.75 | 4-20-09 | CRC 84 | .25 | 62.50 | 7-11-09 | CRC 84 | 31.25 |
| 7-18-11 | 20130 | " | " | " | 29400 | .37½ | 110.25 | 4-20-09 | CRC 84 | .25 | 73.50 | 7-11-09 | CRC 84 | 36.75 |
| 5-20-11 | 16814 | Los Angeles | Tehachapi | Sugar | 1512 | .53 | 8.01 | 2-15-11 X | CRC 134 | .37½ | 5.67 | 3-22-11 | CRC 134 | 2.34 |
| 6-30-11 | 25021 | " | Delano | Galvanized Ir. | 2475 | .55 | 13.61 | 2-15-11 X | CRC 134 | .37½ | 9.28 | 3-22-11 | CRC 134 | 4.33 |
| 2-21-11 | 17904 | " | Tehachapi | Tomatoes | 2800 | .53 | 14.84 | 2-15-11 X | CRC 134 | .37½ | 10.50 | 10-10-09 | CRC 134 | 4.34 |
| 6- 1-11 | 607 | " | Delano | Sheet Iron | 2985 | .55 | 16.42 | 2-15-11 X | CRC 134 | .37½ | 11.20 | 3-22-11 | CRC 134 | 5.22 |
| 3-11-11 | 9648 | " | Tehachapi | Carbide | 2140 | .58 | 12.41 | 2-15-11 X | CRC 134 | .42½ | 9.25 | 10-10-09 | CRC 134 | 3.16 |
| 3-27-11 | 23535 | " | " | Meger & Parts | 1845 | .58 | 10.70 | 2-15-11 X | CRC 134 | .42½ | 7.84 | 3-22-11 | CRC 134 | 2.86 |
| 9-30-11 | 25412 | " | Delano | Galvanized Ir. | 2284 | .55 | 12.56 | 2-15-11 X | CRC 134 | .37½ | 8.57 | 3-22-11 | CRC 134 | 3.99 |
| 6- 1-11 | 434 | " | " | " | 2012 | .55 | 11.07 | 2-15-11 X | CRC 134 | .37½ | 7.47 | 3-22-11 | CRC 134 | 3.60 |
| 7-25-11 | 20917 | " | Tehachapi | Wagon K.D. | 1590 | .58 | 9.32 | 2-15-11 X | CRC 134 | .42½ | 6.86 | 3-22-11 | CRC 134 | 2.46 |
| | | | | TOTAL | | | 3851.24 | | | | 2713.30 | | | 1137.94 |

(X) Rate based .06 to Lathrop Sup 1 CRC 84 3-22-10
X .30½ Lathrop to Sanger Sup 8 CRC 12 2-15-11
.36½

X Case 110

("CAC" means "California Railroad Commission")

Smythill

| Date | No. | From | To | Commodity | Wt. | Specific Rate Collected Per 100 lbs. | Charges Collected | Thro Rate Effective If Tariff In Col. 10 Should Have Been Followed | Charges Collected Were Based On Tariff No. | Thru Rate S.F. to L.A. or L.A. to S.F. Rate | Thru Rate S.F. to L.A. or L.A. to S.F. Charges | Thro Through Rate Effective If Through Rate Should Have Been Followed. | Tariff Reference | Difference Between Specific and Through Charges |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. | 2. | 3. | 4. | 5. | 6. | 7. | 8. | 9. | 10. | 11. | 12. | 13. | 14. | 15. |
| 3-13-11 | 8326 | San Francisco | Mojave | Wine in Glass | 855 | 1.10 | 9.41 | 6-11-09 | CRC 134 | .60 | 5.14 | 10-10-09 | CRC 134 | 4.27 |
| 3-11-11 | 12459 | " | Delano | Sheet Iron | 1805 | .62 | 11.19 | 6-11-09 | CRC 12 | .37½ | 6.77 | 10-10-09 | CRC 134 | 4.42 |
| 3- 1-11 | 88 | " | " " | " " | 2644 | .62 | 16.39 | 6-11-09 | CRC 12 | .37½ | 11.02 | 3-22-11 | CRC 134 | 5.37 |
| 3-15-11 | 18041 | " | " | Pipe | 1700 | .62 | 10.54 | 6-11-09 | CRC 12 | .37½ | 6.38 | 3-22-11 | CRC 134 | 4.16 |
| 3-17-11 | 13218 | Los Angeles | San Luis Ob. | Tank Iron | 87800 | .27½ | 241.45 | 3-22-11 | CRC 134 | .17½ | 153.65 | 1-25-11 | CRC 84 | 87.80 |
| 3- 4-11 | 2549 | " | " " | " " | 97900 | .27½ | 269.23 | 3-22-11 | CRC 134 | .17½ | 171.35 | 1-25-11 | CRC 84 | 97.90 |
| 3-25-11 | 23280 | " | Bakersfield | Working Brls. | 6580 | .58 | 38.16 | 2-15-11 | XCRC 134 | .42½ | 27.48 | 3-22-11 | CRC 134 | 10.68 |
| 3- 8-11 | 5136 | " | San Luis Ob. | Tank Iron | 77400 | .27½ | 212.85 | 3-22-11 | CRC 134 | .17½ | 135.45 | 1-25-11 | CRC 134 | 77.40 |
| 2-13-11 | 9540 | " | Exeter | St.Riv.Pipe | 20000 | .56 | 112.00 | 10-10-09 | CRC 134 | .27½ | 55.00 | 10-10-09 | CRC 134 | 57.00 |
| 7-24-11 | 19525 | " | San Luis Ob. | Bar Iron | 36000 | .27½ | 99.00 | 3-22-11 | CRC 134 | .15 | 54.00 | 3-22-10 | CRC 84 | (X) 45.00 |
| 5-12-11 | 9147 | " | Bakersfield | Oil Well Sup. | 36380 | .40 | 145.52 | 2-15-11 | XCRC 134 | .30 | 109.14 | 3-22-11 | CRC 134 | 36.38 |
| 8-18-11 | 14662 | " | " | Boiler Shell | 8250 | .67 | 55.28 | 2-15-11 | XCRC 134 | .60 | 49.51 | 3-22-11 | CRC 134 | 5.77 |
| 8-29-11 | 1014 | Emery | Fresno | Bar Iron | 43062 | .36 | 155.03 | 6-11-09 | CRC 12 | .15 | 64.60 | 3-22-10 | CRC 84 | 90.43 |
| 8-26-11 | 1015 | " | " " | " " | 38050 | .36 | 136.91 | 6-11-09 | CRC 12 | .15 | 57.05 | 3-22-10 | CRC 84 | 79.86 |
| 2- 1-11 | 57 | Los Angeles | Bakersfield | Oil Well Sup. | 41140 | .50 | 205.70 | 10-10-09 | CRC 134 | .30 | 123.42 | 10-10-09 | CRC 134 | 82.28 |
| 5-13-11 | 10308 | " | " | " " " | 32400 | .40 | 129.60 | 2-15-11 | XCRC 134 | .30 | 97.20 | 2-15-11 | CRC 134 | 32.40 |
| 4-22-11 | 18895 | " | " | Working Brls. | 3940 | .58 | 22.85 | 2-15-11 | XCRC 134 | .42½ | 16.74 | 3-22-11 | CRC 134 | 6.11 |
| 7-27-11 | 23543 | " | " | " " | 6720 | .58 | 38.98 | 2-15-11 | XCRC 134 | .42½ | 28.57 | 3-22-11 | CRC 134 | 10.41 |
| 8-10-11 | 5601 | " | " | " " | 4920 | .58 | 28.54 | 2-15-11 | XCRC 134 | .42½ | 20.92 | 3-22-11 | CRC 134 | 7.62 |
| 3-24-11 | 20486 | " | " | Sucker Rods | 10550 | .53 | 55.92 | 2-15-11 | XCRC 134 | .37½ | 39.57 | 3-22-11 | CRC 134 | 16.35 |
| 3-24-11 | 22188 | " | " | Pig Iron | 5535 | .58 | 32.10 | 2-15-11 | XCRC 134 | .42½ | 23.52 | 3-22-11 | CRC 134 | 8.58 |
| 7-25-11 | 28436 | San Francisco | " | Beer | 24700 | .37½ | 92.63 | 3-22-10 | CRC 84 | .25 | 61.76 | 3-22-10 | CRC 84 | 30.87 |
| 7-12-11 | 13169 | " | " | " | 24700 | .37½ | 92.63 | 3-22-10 | CRC 84 | .25 | 61.76 | 3-22-10 | CRC 84 | 30.87 |
| 6-12-11 | 14480 | " | " | " | 24600 | .37½ | 92.25 | 3-22-10 | CRC 84 | .25 | 61.60 | 3-22-10 | CRC 84 | 30.65 |
| 6- 3-11 | 3914 | " | " | " | 24700 | .37½ | 92.63 | 3-22-10 | CRC 84 | .25 | 61.76 | 3-22-10 | CRC 84 | 30.87 |
| 6- 7-11 | 8270 | " | " | " | 24500 | .37½ | 91.88 | 3-22-10 | CRC 84 | .25 | 61.26 | 3-22-10 | CRC 84 | 30.62 |
| 6-20-11 | 25253 | " | " | " | 25140 | .37½ | 94.28 | 3-22-10 | CRC 84 | .25 | 62.66 | 3-22-10 | CRC 84 | 31.62 |
| 5- 9-11 | 10763 | " | " | " | 24500 | .37½ | 91.88 | 3-22-10 | CRC 84 | .25 | 61.26 | 3-22-10 | CRC 84 | 30.62 |
| 4-29-11 | 35250 | " | " | " | 24700 | .37½ | 92.63 | 3-22-10 | CRC 84 | .25 | 61.76 | 3-22-10 | CRC 84 | 30.87 |
| 6-28-11 | 35827 | " | " | " | 24900 | .37½ | 93.37 | 3-22-10 | CRC 84 | .25 | 62.24 | 3-22-10 | CRC 84 | 31.13 |
| 6-24-11 | 31656 | " | " | " | 24800 | .37½ | 93.00 | 3-22-10 | CRC 84 | .25 | 62.00 | 3-22-10 | CRC 84 | 31.00 |
| 6-19-11 | 23737 | " | " | " | 24500 | .37½ | 91.88 | 3-22-10 | CRC 84 | .25 | 61.26 | 3-22-10 | CRC 84 | 30.62 |
| 2-16-12 | 10991 | Los Angeles | " | Sucker & Fitgs. | 10785 | .53 | 57.16 | 2-15-11 | XCRC 134 | .37½ | 40.44 | 3-22-11 | CRC 134 | 16.72 |
| 11-11-11 | 8182 | " | " | Oil Well Sup. | 37380 | .40 | 149.52 | 2-15-11 | XCRC 134 | .30 | 112.14 | 3-22-11 | CRC 134 | 37.38 |
| 11- 4-11 | 2666 | " | Exeter | Tank Iron | 13550 | .57 | 77.24 | 2-15-11 | XCRC 134 | .37½ | 50.82 | 3-22-11 | CRC 134 | 26.42 |
| 3- 1-12 | 2242 | San Francisco | Delano | Sheet Iron | 1830 | .62 | 11.35 | 6-11-09 | CRC 12 | .37½ | 6.87 | 3-22-11 | CRC 134 | 4.48 |
| 3- 3-12 | 10298 | " | " | Iron & Fitgs. | 2423 | .62 | 15.02 | 6-11-09 | CRC 12 | .37½ | 9.09 | 3-22-11 | CRC 134 | 5.93 |
| 4-15-12 | 20655 | " | " | Iron | 2080 | .62 | 12.90 | 6-11-09 | CRC 12 | .37½ | 7.81 | 3-22-11 | CRC 134 | 5.09 |
| 1-29-12 | 32912 | " | Mojave | Beer | 24000 | .37½ | 90.00 | 3-22-10 | CRC 84 | .25 | 60.00 | 3-22-10 | CRC 84 | 30.00 |
| 4-30-12 | 25000 | " | " | " | 25000 | .37½ | 93.75 | 3-22-10 | CRC 84 | .25 | 62.50 | 3-22-10 | CRC 84 | 31.25 |
| 12-23-11 | 31019 | " | " | Whiskey | 1000 | 1.03 | 10.30 | 6-11-09 | CRC 134 | .48½ | 4.80 | 3-22-11 | CRC 134 | 5.50 |
| 11- 4-11 | 3645 | " | " | Beer | 24350 | .37½ | 91.31 | 3-22-10 | CRC 84 | .25 | 60.87 | 3-22-10 | CRC 84 | 30.44 |
| 6- 4-12 | 3900 | " | " | " | 29720 | .37½ | 111.45 | 3-22-10 | CRC 84 | .25 | 74.30 | 3-22-10 | CRC 84 | 37.15 |
| 2-29-12 | 35003 | " | " | " | 24400 | .37½ | 91.50 | 3-22-10 | CRC 84 | .25 | 61.00 | 3-22-10 | CRC 84 | 30.50 |
| 12- 8-11 | 4353 | Los Angeles | Tehachapi | Refined Oil | 2892 | .58 | 16.54 | 2-15-11 | XCRC 134 | .42½ | 12 12 | 3-22 11 | CRC 134 | 4.42 |
| 12- 1-11 | 99 | " | Fresno | Paper | 40000 | .52 | 208.00 | 2-15-11 | XCRC 134 | .27½ | 110.00 | 3-22 11 | CRC 134 | 98.00 |
| 6-11-12 | 5300 | " | " | Roofing | 36770 | .43 | 158.11 | 5-21-12 | CRC 1515 | .27½ | 101.12 | 5-27-12 | CRC 1515 | 56.99 |
| 6- 3-12 | 228 | " | " | Bees Wax | 4150 | .79 | 32.79 | 2-15-11 | XCRC 134 | .60 | 24.91 | 3-22 11 | CRC 134 | 7.88 |
| 2-19-12 | 12841 | " | " | Boiler over 10 ft. & Front | 3095 | .79 | 24.45 | 2-15-11 | XCRC 134 | .60 | 18 57 | 3-22-11 | CRC 134 | 5.88 |
| | | | TOTAL | | | | 4297.10 | | | | 2753.14 | | | 1543.96 |

(X) Complaint shows through rate 25¢. Difference $9.00

X Case 110

| Waybill Date 1. | No. 2. | From 3. | To 4. | Commodity 5. | Wt. 6. | Specific Rate Collected Per 100 lbs 7. | Charges Collected 8. | Date Rate Effective If Tariff In Col. 10 Should Have Been Followed 9. | Charges Collected Were Based On Tariff No. 10. | Thru Basis S.F. to L.A. or L.A. to S.F. Rate 11. | Thru Basis S.F. to L.A. or L.A. to S.F. Charges 12. | Date Through Rate Effective If Through Tariff Should Have Been Followed 13. | Tariff Reference 14. | Difference Between Specific and Through Charges 15. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2-10-12 | 104 | Paraffin | Fresno | Roofing | 31050 | .36 | 111.78 | 6-11-09 | CRC 12 | .27½ | 85.39 | 3-22-11 | CRC 134 | 26.39 |
| 4-25-12 | 26 | Livny | Sanger | Sulphur | 39680 | .21½ | 84.32 | 6-11-09 | CRC 12 | .15 | 59.52 | 11-28-10 | CRC 84 | 24.80 |
| 10-16-11 | 2718 | Paraffin | Fresno | Roofing | 38749 | .36 | 139.49 | 6-11-09 | CRC 12 | .27½ | 106.55 | 3-22-11 | CRC 134 | 32.94 |
| 11-10-11 | 3022 | " | " | " | 30427 | .36 | 109.54 | 6-11-09 | CRC 12 | .27½ | 83.59 | 3-22-11 | CRC 134 | 25.95 |
| 3-15-12 | 162 | " | " | " | 30102 | .36 | 108.37 | 6-11-09 | CRC 12 | .27½ | 82.78 | 3-22-11 | CRC 134 | 25.59 |
| 1-10-12 | 73 | " | " | " | 30012 | .36 | 108.04 | 6-11-09 | CRC 12 | .27½ | 82.53 | 3-22-11 | CRC 134 | 25.51 |
| 1-26-12 | 40 | Leslie | Sanger | Salt | 32465 | .18½ | 60.00 | 6-11-09 | CRC 12 | .15 | 48.64 | 11-28-10 | CRC 84 | 11.36 |
| 12- 8-11 | 9154 | San Francisco | Sanger | Fencing | 7605 | .49 | 37.26 | 6-11-09 | CRC 12 | .42½ | 32.32 | 3-22-11 | CRC 134 | 4.94 |
| 10-20-11 | 21814 | " | " | Beans | 8000 | .49 | 39.20 | 6-11-09 | CRC 12 | .42½ | 34.00 | 3-22-11 | CRC 134 | 5.20 |
| 12-21-11 | 2175 | " | Fresno | Rice | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 12- 9-11 | 712 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 11-10-11 | 1312 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 5- 4-12 | 423 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 1-19-12 | 1770 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 11- 4-11 | 3098 | " | " | Metal Lath | 11586 | .47 | 54.90 | 6-11-09 | CRC 12 | .42½ | 49.64 | 3-22-11 | CRC 134 | 5.26 |
| 3-22-12 | 28569 | " | " | St.Pul.& Bush. | 24000 | .33½ | 80.40 | 6-11-09 | CRC 12 | .30 | 72.00 | 3-22-11 | CRC 134 | 8.40 |
| 3- 6-12 | 515 | " | " | Rice | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 9-29-11 | 3837 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| | | TOTAL | | | | | 1941.30 | | | | 1507.05 | | | 434.25 |

## RECAPITULATION

| | | | | |
|---|---|---|---|---|
| Page 1 | 3851.24 | 2713.30 | | 1137.94 |
| " 2 | 4297.10 | 2753.14 | | 1543.96 |
| " 3 | 1941.30 | 1507.05 | | 434.25 |
| TOTAL | 10089.64 | 6973.49 | | 3116.15 |

(Testimony of E. J. Reinhart.)

WITNESS.—(Continuing.) By the note under column 10, "X case 110," I mean that that refers to the California Railroad Commission's Case Number 110.

Mr. BOOTH.—I have a certified copy of the order here, which I will offer now.

Mr. HARWOOD.—What is the purpose of offering that in evidence, Mr. Booth?

Mr. BOOTH.—The purpose of offering this in evidence is to connect up the rates established by the Commission with the orders of the Commission made after October 10, 1911, which we claim had the effect of allowing the railroads to continue charging the greater rates for the lesser distance. It is offered in connection with our special defense No. 7.

Mr. HARWOOD.—That brings up this very point as to whether or not the Railroad Commission had any authority to permit carriers to charge a greater sum for the shorter distance without an investigation by the Railroad Commission. I think, if your Honor please, that that matter was fully discussed in the briefs in this case, and I am of the opinion that your Honor in your opinion passed upon that matter, and that your Honor was of the opinion that the defendant in this case had no defense unless it could show that the Railroad Commission did grant relief. Now this offer does not purport to show that the Railroad Commission granted relief—merely that they gave temporary protection pending the investigation. It is clear under the California Constitution that the Railroad Commission had no power to make such order—

(Testimony of E. J. Reinhart.)

Mr. BOOTH.—I do not think counsel understands what I am offering.

Mr. HARWOOD.—What are you offering?

Mr. BOOTH.—I am offering now a certified copy of an order and decision of the Railroad Commission of the State of California, [167—13] in Case No. 110, entitled "Associated Jobbers of Los Angeles, Complainant, vs. Southern Pacific Company, a Corporation, and Atchison, Topeka & Santa Fe Railway Company, a Corporation, Defendants; Jobbers & Manufacturers' Association of Stockton and Traffic Bureau of the Merchants' Exchange of San Francisco, Interveners."

The COURT.—What is that order?

Mr. BOOTH.—It is an order fixing certain rates for San Joaquin Valley. It is the order referred to under column 10 of Exhibit "A" as Case No. 110.

Mr. HARWOOD.—What is the date of the order, Mr. Booth?

Mr. BOOTH.—December 20, 1910.

Mr. HARWOOD.—This order was before the amendment to the Constitution, and clearly can have no relevancy in this case. If counsel were offering an order made after the amendment to the Constitution which granted relief, that would be different. Here is an order made before the Constitution was amended.

The COURT.—Upon what theory do you offer that? That thereafter notwithstanding they hal no power to modify this long and short haul rate prior to the amendment to the Constitution, that after the

amendment became effective this order would become effective?

Mr. BOOTH.—I am offering it on two theories, if your Honor please; first, on the theory that by the amendment to the Constitution of October 10, 1911—

The COURT.—That was a year after this order.

Mr. BOOTH.—Yes—the existing rates, whatever they were, were preserved in effect, and second, on the theory that the chain of orders which I will offer later, made by the Railroad Commission after October 10, 1911, referred to and by necessary implication made this establishment of rates a part of these orders. **[168—14]**

Mr. HARWOOD.—If your Honor please, the amendment to the Constitution, which is referred to in the Eshleman Act, if it made any rates legal at all after the Constitution went into effect, made only those legal under the old Constitution, and these rates were illegal under the old Constitution, and therefore the amendment to the Constitution did not legalize anything that was theretofore illegal.

The Court thereupon sustained plaintiff's objection, to which defendant excepted.

**(Exception No. 3.)**

Said order is in words and figures as follows **[169—15]**

BEFORE THE RAILROAD COMMISSION
of the
STATE OF CALIFORNIA.
Case No. 110.

ASSOCIATED JOBBERS OF LOS ANGELES,
Complainant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
Defendants,

JOBBERS AND MANUFACTURERS' ASSOCIATION OF STOCKTON AND TRAFFIC BUREAU OF THE MERCHANTS' EXCHANGE OF SAN FRANCISCO,
Intervenors.

Submitted September 1, 1910.
Decided December 20, 1910.

Messrs. KUSTER, LOEB and LOEB, for Complainant.

WM. F. HERRIN and C. W. DURBROW, for Defendant Southern Pacific Company.

E. W. CAMP and U. T. CLOTFELTER, for Defendant Atchison, Topeka and Santa Fe Railway Company.

C. L. NEUMILLER, for Jobbers and Manufacturers' Association of Stockton.

WM. R. WHEELER and SETH MANN, for Traffic Bureau of the Merchants' Exchange.

REPORT AND OPINION OF THE COMMISSION.

The complainant complains that the rate of freight

governed by class rates, ranging from first class to Class E of current tariffs, and upon the commodity of beer in carload lots from [**170—16**] Los Angeles to the following points or stations in the San Joaquin Valley:

| | | |
|---|---|---|
| Coalinga | Olig | Porterville |
| Goshen | Fresno | Bakersfield |
| Tulare | Hanford | McKittrick |
| Oil City | Exeter | Visalia |

and all intermediate points therewith, are both unreasonable and discriminatory.

The unreasonableness appears to be measured by rates applying from San Francisco to equi distance points with the points or stations complained of, as well as by comparison with rates applying for equal mileages between other points similarly situated.

The second count, discrimination, is based upon defendants' rates from San Francisco; the complainant contending that her merchants are unable to meet San Francisco at or near the halfway point between the two cities by reason of discriminatory rates which give undue preference and advantage to San Francisco.

The Traffic Bureau of the Merchants' Exchange of San Francisco intervenes upon the second count, and contends that complainants are not discriminated against, but, considering physical conditions, rates are in favor of complainant and to the prejudice of San Francisco.

The Jobbers and Manufacturers' Association of Stockton intervenes and asks consideration in any adjustment that may be made, but particularly

differentials existing between San Francisco and Stockton and the points complained of, and that Stockton be given the full benefit of the local rates between San Francisco and Stockton and rates from Stockton to the points involved, which are as follows:

In cents per 100 pounds:

| 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|
| .10 | .10 | .09 | .09 | .07 |

and other class rates, as shown by current tariffs. Short line **[171—17]** distance from San Francisco to Stockton appears to be seventy-eight (78) miles, and in considering established class rates as above for a distance of seventy-eight (78) miles they can at least be considered unreasonably low as compared with other cities; for instance, from Stockton to a point seventy-eight (78) miles south, Los Banos, the rates are

In cents per 100 pounds.

| 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|---|---|---|---|---|---|---|---|---|---|
| .45 | .41 | .39 | .35 | .30 | .30 | .17 | .15½ | .12 | .11¾ |

and are certainly forced rates brought by keen water competition, as originally we find that the rates between San Francisco and Stockton were much higher.

The differentials that now exist and have eixsted for a number of years in the past between San Francisco, Stockton and San Joaquin Valley points, are much lower than the forced rates, being as follows:

In cents per 100 pounds.

| 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|
| .05 | .07 | .07 | .07 | .04 |

and still less on other car-load class rates. The record is not clear as to the reason for the existing

low differential, except that it is to be gathered that they were made lower than the forced local rates in order to prevent water carriers operating between San Francisco and Stockton in participating in freight traffic between San Francisco and points in the San Joaquin Valley south of Stockton in connection with rail carriers Stockton south. But it is apparent that such danger does not exist to-day, and while it is the custom for reasonable differentials to exist between commercial cities, it is fair to say that such low existing differentials would not have existed were it not for the reason of the low forced water competitive class rates. Stockton merchants should have the full benefit of a forced rate condition between **[172—18]** San Francisco and Stockton as well as San Francisco merchants, and the Stockton rates to the points complained of herein should be lower to the extent of the existing class rates between San Francisco and Stockton. Stockton merchants complain also that Sacramento merchants have an advantage in differentials to points in the San Joaquin Valley. We find that Sacramento, like Stockton, enjoys water competitive rates, and the distance by water and water service between San Francisco and Sacramento and Stockton are on a fair parity; however, the adjustment outlined herein as between San Francisco and Stockton to points in controversy will raise the now existing discrimination between Sacramento and Stockton and the points complained of.

We now come to the contention of the merchants of Los Angeles. Class rates from San Francisco to

Berenda, a point one hundred and sixty-eight (168) miles from San Francisco, are as follows:

In cents per 100 pounds.

| 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|---|---|---|---|---|---|---|---|---|---|
| .47 | .42 | .38 | .35 | .29¼ | .27½ | .19½ | .17¼ | .15¼ | .13 |

Class rates from Los Angeles to Bakersfield, a point equal distant from Los Angeles (168 miles), are as follows:

In cents per 100 pounds.

| 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|---|---|---|---|---|---|---|---|---|---|
| .71 | .68 | .64 | .61 | .48 | .50 | .30¾ | .27½ | .22½ | .22½ |

The percentages in favor of the former range from 51 per cent first class to 73 per cent Class E, and while the rates from San Francisco to Berenda are much lower than the rates from Los Angeles to Bakersfield, the former may be considered to some extent forced rates, and taking into consideration all the conditions surrounding the compelling features of the former rates, we are of opinion that the present rate from Los Angeles to Bakersfield and other points north thereof in the San Joaquin Valley, mentioned **[173—19]** herein, are excessive. This opinion is further corroborated by the fact that the defendants themselves so considered them in contemplating an adjustment of rates to and from the points in controversy, and were only prevented from making their rates effective upon that occasion by objection on the part of the San Francisco merchants.

The San Francisco intervenors made much of the increased cost of operation over the grades, particularly Tehachapi grade from Los Angeles to Bakersfield. In the question of the cost of operation, while a great mass of evidence was submitted, it was

shown that the Tehachapi line was operated jointly by the Santa Fe and the Southern Pacific, thus reducing the cost to each line. Commissioner Lane of the Interstate Commerce Commission, in Case No. 2839, involving rates between Sacramento, Reno and Lovelock, expressed our views very aptly. He says: "We do not recognize the right of a carrier to single out a piece of expensive road and make the local traffic thereon bear an undue portion of the expense of its maintenance or of its construction. A road is built and operated as a whole, and local rates are not to be made with respect to the difficulties of each particular portion, charging the cost of a bridge to the traffic of one section or the cost of a tunnel to traffic between its two mouths. * * * If the position of the defendant were followed by the carriers generally it would result in rates that would vary from mile to mile as the cost of road per mile varies." And, consequently, we give no important consideration to either the cost of operating the terminals of San Francisco upon which so much stress was laid, including the bay and Dumbarton cut-off, or the grades between Los Angeles and Bakersfield, except that one in a measure offsets the other.

In reaching our conclusions we are cognizant of the fact that the Santa Fe line from Los Angeles to the San Joaquin Valley is of greater length than its competitor, but we have considered [174—20] the request of the Santa Fe that it be considered upon the same mileage as the Southern Pacific. San Joaquin Valley is a very rich territory and is growing

rapidly, and Los Angeles, San Francisco, and Stockton must be considered not only as sources of supply for the Valley, but as markets for its products as well.

IT IS HEREBY ORDERED, that the defendants make effective, not later than February 15, 1911, tariffs in keeping with this opinion, fixing class rates from Los Angeles to Bakersfield, as follows:

| | In cents per 100 pounds. | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| And from Los Angeles to Visalia | .71 | .66 | .61 | .57 | .47 | .44 | .30 | .26 | .22 | .19 |
| | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
| | .67 | .62 | .58 | .53 | .44 | .40 | .27 | .24 | .21 | .17 |
| And from Los Angeles to Fresno | .79 | .74 | .68 | .63 | .52 | .48 | .33 | .29 | .25 | .21 |

graduating the rates between the above points. Rates from Los Angeles, San Francisco, and Stockton to points on branch lines which leave the main lines between Kern Junction, Bakersfield, and south of Fresno, shall be fixed in the same manner, i. e., if the rates from San Francisco to a branch line point is ten cents higher than to the main line junction point then the rate from Los Angeles and Stockton shall also be ten cents higher than the junction or main line point. From Stockton south the defendants reduce their rates so as to give Stockton the benefit of a differential under San Francisco equal to the existing class rates from San Francisco to Stockton upon all classes to all points involved. The commodity rate complained of was beer. Without giving definite figures the carriers will arrange their tariffs in such a manner as to eliminate the present discrimination, using as a basis the adjust-

ment outlined for class rates.

(Signed) A. C. IDWIN,
Commissioner.
THEODORE SUMMERLAND,
Commissioner.

Attest: W. D. WAGNER,
Secretary. **[175—21]**

**[Testimony of F. W. Gomph, for Defendant.]**

F. W. GOMPH, being first duly sworn as a witness for the defendant, testified as follows:

The WITNESS.—I am agent of the Pacific Freight Tariff Bureau. During May, 1909, I was in charge of the tariff department of the Southern Pacific Company.

Mr. BOOTH.—During that month state what you did with regard to the tariffs of the Southern Pacific Company applicable to local freight movements in California, so far as the California Railroad Commission was concerned.

Mr. HARWOOD.—That is objected to upon the same grounds as the objection to the order—immaterial, irrelevant and incompetent.

The COURT.—What was the month?

Mr. BOOTH.—May, 1909.

The COURT.—What is the purpose of it?

Mr. BOOTH.—The purpose of this, if your Honor please, is to show that in May, 1909, on the request, or rather on the order, of the Commission, the Southern Pacific Company filed with the Commission all of its printed tariffs, including certain of the tariffs shown in "Exhibit A" introduced in this case. I

(Testimony of F. W. Gomph.)

propose to follow this up by showing that thereafter the Railroad Commission, by an order, a certified copy of which I have here, approved and adopted those tariffs as the moving rates therein specified; and the pertinency of that is to connect it up with the order that the Commission made after the amendment of October 10, 1911, continuing existing rates in force until the Commission could determine the question of violation of the long and short haul clause.

Mr. HARWOOD.—It seems to me that this matter is all covered by the special defense to which the demurrer was sustained, and that it is not necessary for counsel to go into the matter again. [176—22]

The COURT.—I do not remember the full scope of the decision on the demurrer. What was it?

Mr. BOOTH.—The decision, I believe, was to the effect that before October 10, 1911, the Railroad Commission had no power to make rates.

The COURT.—I remember that.

Mr. BOOTH.—But you overruled the demurrer to the seventh special defense, to the effect that after October 10, 1911, they had the power and had exercised the power to relieve. We want to show what they relieved from, and we cannot show it without showing the rates that were then in force.

The COURT.—I do not see anything in the memorandum opinion expressly covering the suggestion you make, Mr. Harwood.

Mr. HARWOOD.—The only purpose of offering evidence as to what tariffs were approved by the

(Testimony of F. W. Gomph.)

Commission prior to the amendment to the Constitution of October 10, 1911, would be to show that the rates specified in this were legal rates, which they could not be under your Honor's decision.

The COURT.—I do not understand that to be the purpose of the present offer. The proposition is to follow this offer up with a showing that after the amendment of October 10, 1911, the State Board, referring to the rates fixed by this order, made an order continuing them in force until it could have an opportunity to make an investigation as to the propriety of these rates. Is that not it?

Mr. BOOTH.—Yes. I will say in fairness to the Court, it may be a matter of argument whether their resolution had that effect; but I think we are entitled to show, and we cannot show all at once just what they tried to do.

The COURT.—I think the thing for you to offer first is the order made subsequent to the adoption of the Constitution. We can determine then the scope of that, and if it is admissible **[177—23]** then you can offer to show what those rates were that were referred to in that order.

Mr. BOOTH.—Then I should like to renew the offer of the order in Case No. 110. I will ask permission to withdraw the witness temporarily while I offer this documentary evidence.

The COURT.—Very well.

Mr. BOOTH.—Now, I should like first to offer a certified copy of an order made by the Railroad Commission of the State of California in its Case No. 214.

(Testimony of F. W. Gomph.)

This order was made October 26, 1911. This case is entitled "In the Matter of the Provisions of Section 21 of Article XII of the Constitution of California, relating to long and short hauls and through rates exceeding aggregate of intermediate rates." I should like to offer that as defendant's exhibit next in order.

Mr. HARWOOD.—You might read it, Mr. Booth.

Mr. BOOTH.—It is quite long. The essential part of it is:

> "Now, Therefore, be it ordered that each railroad and other transportation company which has filed with this Commission any schedule containing any rate or fare showing a greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or a greater compensation as a through rate than the aggregate of the intermediate rates, file with the Commission on or before the 2nd day of January, 1912, a complete list of each rate or charge not in conformity with said provisions of the Constitution of this State, unless authorized by this Commission, as shown by its schedules of rates and fares on file with this Commission, showing in each case the name of the commodity or description of the traffic, or the passenger or other service, the point or points of origin and destination, the highest intermediate rate or

fare, with the name of the point (in case of long and short haul), or the different intermediate rates (in case of a greater compensation for a through rate), and the rate or fare to the more distant point.

Be it futher ordered that each of said railroad and other transportation companies present to this Commission on or before said 2nd day of January, 1912, for examination and investigation by this Commission, a new schedule or schedules removing said deviations from the provisions of said section of the Constitution of this State, or in case it is desired to justify the same, or any of them, an application or applications to be relieved from the provisions of said section, said application or applications to be in such of the two following forms as may meet the conditions as to which relief is sought." **[178—24]**

Then follows a form for the companies to use, and regulations regarding the filing of the forms. The order which I have referred to is that of October 26, 1911.

Mr. HARWOOD.—Objected to on the ground that it is immaterial, irrelevant and incompetent, and not showing any order granting relief.

The COURT.—I do not see the materiality of that, unless you can show me how it is material.

Mr. BOOTH.—It is merely preliminary to offering the whole proceeding in Case 214, including the application for relief in regard to these respective rates.

The COURT.—All we are concerned with here, Mr. Booth, under the issues in this case, is any instances in which the Railroad Commission upon application has made an order authorizing suspension, that is, authorizing a deviation from the provisions of the Constitution in question. That power was given them by the amendment of October 10, 1911. Any instance where they did not authorize it it was just as obligatory upon the carrier as it was before.

Mr. BOOTH.—Your Honor, it is merely preliminary.

The COURT.—What is its materiality, if it is preliminary? Of course I can see it is merely preliminary.

Mr. BOOTH.—It is all part of the same proceeding, and if it develops not to be material it can go out, on a motion to strike out.

The COURT.—If you will offer that which does bear directly upon the subject, and that that shows that this is material, then this case can be admitted, but at the present time I do not see its materiality.

Mr. BOOTH.—I will withdraw that temporarily, and offer the order of November 20, 1911, in the same proceeding, a certified copy of the order, which reads: **[179—25]**

> "Permission is hereby granted to railroads and other transportation companies, until January 2, 1912, to file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business,

continuing under the present rate bases or adjustments, higher rates or fares at intermediate points; provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911, except when a longer line or route desires to reduce rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line.

The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission, or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2, 1912."

Here is an express permission to continue.

The COURT.—Yes, but would that meet your necessities? It is an express permission given in a tentative way—I mean given tentatively to continue to charge those rates under certain limitations as they had existed theretofore, but all, according to that order, to be thereafter the subject of adjustment by the Commission. It seems to me that, assuming that you had proceeded under that order, in order to show a valid charge in any instance where complaints would follow, that the charge made did transgress this constitutional provision, you would have to show that the Railroad Commission upon investigation did authorize the deviation from that provision, would you not?

Mr. BOOTH.—That is exactly the point. The

question is, what does that word "investigation" mean? The Railroad Commission had these tariffs on file with it, and they granted this permission, according to the order.

The COURT.—That order expressly shows they had not made any investigation up to that time because they fixed a future date for the investigation.

Mr. BOOTH.—A general investigation.

Mr. HARWOOD.—Ifyour Honor please, the application of [180—26] that carrier was not on file when this order was made.

Mr. BOOTH.—That is true.

The COURT.—That is an extraordinary order, I presume, growing out of the fact that the amendment to the Constitution had been adopted so recently that they had not had time to investigate the whole subject yet.

Mr. BOOTH.—I suppose investigation with the railroad commission is different from a hearing which the courts speak of in their decisions. Hearing implies notice, opportunity to produce testimony.

The COURT.—Of course they investigate anything that is brought before them, but investigation in its general sense, as used with reference to the transactions of a board of this kind, has particular reference to investigations initiated by themselves on general lines.

Mr. BOOTH.—Your Honor will pardon the digression, but very often we have orders served on us by the Commission, on their motion, which recite that after an investigation the Commission is convinced the matter should be brought on for hearing. I take

it that the investigation meant in the amendment to the Constitution might be an investigation which would meet the definition of due process, or it might be an investigation to which we were not a party.

The COURT.—What does that amendment to the Constitution provide?

Mr. BOOTH.—"It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates; provided, however, that upon application to the Railroad Commission provided for in this Constitution, such company may, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances for the transportation of persons or property." [181—27]

The COURT.—That is limited by what immediately precedes it. It must be upon application by the company.

Mr. BOOTH.—Of course, if your Honor takes that view of the case I will frankly say the applications were not filed, as far as these specific rates were concerned, until the 30th of December, 1911. This order was dated on the 20th of November, 1911.

The COURT.—When did these movements of freight occur?

Mr. BOOTH.—The ones that we are immediately concerned with occurred between October 20, 1911, and May 27, 1912.

The COURT.—I do not see how they can be affected, Mr. Booth.

Mr. BOOTH.—I should like to have your Honor's permission to make a record of these documentary exhibits.

The COURT.—Yes, you are entitled to that. A reviewing court might put a different construction on the effect of the evidence. I will admit those offered, of course, with the understanding that counsel has of my views. I am simply admitting them for the purpose of enabling you to make a record.

Mr. HARWOOD.—Could that not be done by marking this for identification?

The COURT.—It can be done by admitting it in evidence.

Mr. BOOTH.—It can go in the record either way.

The COURT.—You may offer it; it may be marked for identification, and I will reserve the ruling until I see the effect of the whole offer that you make.

Defendant's counsel then offered a notice of the California Railroad Commission dated October 26, 1911. The offer was objected to on the ground that it was immaterial, irrelevant and incompetent, and that it did not show that the Railroad Commission after investigation had granted relief. The plaintiff expressly waived the objection that the notice was not certified to. The Court sustained the objection, whereupon defendant excepted. [182—28]

Said offer is in words and figures as follows: [183—29]

**Exhibit No. 4.**

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

No. 214.

IN THE MATTER OF THE PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA, RELATING TO LONG AND SHORT HAULS AND THROUGH RATES EXCEEDING AGGREGATE OF INTERMEDIATE RATES.

NOTICE TO PRESENT LIST OF DEVIATIONS AND TO JUSTIFY EXCEPTIONS.

To All Railroad and Other Transportation Companies Within the State of California:

You and each of you are hereby notified that at a regular meeting of the Railroad Commission of the State of California, held at the office of the Commission in the City of San Francisco, State of California, on the 16th day of October, 1911, all the commissioners being present and voting, the following resolution was unanimously adopted:

"Whereas Section 21 of Article XII of the Constitution of California, as amended on October 10, 1911, provides in part as follows:

> 'It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer dis-

tance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. *Provided,* however, that upon application to the Railroad Commission, provided for in this constitution, such company may, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul;" and,

**[184—30]**

Whereas, most of the railroad and other transportation companies of this State have filed with this commission certain schedules which are not in conformity with said provisions of the Constitution of this State, unless authorized by this commission.

NOW, THEREFORE, BE IT ORDERED that each railroad and other transportation company which has filed with this commission any schedule containing any rate or fare showing a greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or a greater compensation as a through rate than the aggregate of the intermediate rates, file with this commission on or be-

fore the 2d day of January, 1912, a complete list of each rate or charge not in conformity with said provisions of the Constitution of this State, unless authorized by this commission, as shown by its schedules of rates and fares on file with this commission, showing in each case the name of the commodity or description of the traffic, or the passenger or other service, the point or points of origin and destination, the highest intermediate rate or fare with the name of the point (in case of long or short haul) or the different intermediate rates (in case of a greater compensation for a through route), and the rate or fare to the more distant point.

"BE IT FURTHER ORDERED, that each of said railroad and other transportation companies present to this commission on or before said 2d day of January, 1912, for examination and investigation by this commission, a new schedule or schedules removing said deviations from the provisions of said section of the Constitution of this State, or in case it is desired to justify the same, or any of them, an application or applications to be relieved from the provisions of said section, said application or applications to be in such of the two following forms as may meet the conditions as to which relief [185—31] is sought:

(a) The ——— (name of carrier) ———, through ——— (name of officer or agent making application) ———, its ——— (official title of officer or agent) ———, petitions the Railroad Commission of the State of California for authority to establish rates (or fares) for the transportation of ———

(name of commodity or description of traffic, or passengers) ——— from ——— (name of point or points of origin) ——— to ——— (name of point or points of destination) ——— lower than the rates (or fares) concurrently in effect to intermediate points ——— (names of all intermediate points) ———; the highest charge at such intermediate points to apply at ——— (name of intermediate point) ———, and to be not more than ——— (cents per 100 pounds, per ton, per car, or per package, or per passenger) ——— in excess of the rates to ——— (name of more distant) point to which lower rate is proposed) ———. This application is based upon the desire of petitioner to meet (by direct haul over a longer line or route, or by water competition), competitive conditions created at ——— (name of more distant point or points at which the lower rates or fares are proposed) ——— by ——— (name of railway, or of regular line of steamers or so-called "tramp-vessels").

(b) Application shall be made in general form the same as (a), but shall request authority to charge a higher rate or fare as the through rate or fare than the aggregate of the intermediate rates or fares. The application shall state clearly the [186—32] reasons in support thereof, and shall specify the extent to which it is desired to make the through rate or fare higher than the aggregate of the intermediate rates or fares.

Separate applications should be made for different situations governed by different rate adjustments or competitive influences. Where the rates or fares

are contained in a joint tariff schedule, a petition from the carrier which issued the schedule or from the duly authorized agent, specifying the same by C. R. C. number, may be made on behalf of the carriers lawfully parties to the schedule, and will be held and considered to be on behalf of all carriers concurring in the schedule. Each carrier may file as many applications as are necessary to present properly the several situations as to which it desires relief, and it is desired that each particular situation be treated by itself. Each application must be certified by the officer or agent making the same.

"AND BE IT FURTHER ORDERED, that the Secretary be and he is hereby ordered to serve a copy of that order on each of said railroad and other transportation companies and to notify each of them to comply with all the requirements hereof."

And you are further notified to comply with each and all requirements of said resolution within the time or times in said resolution specified.

By order of the Commission.

[Seal] (Signed.) CHARLES R. DETRICK,
Secretary.

Dated San Francisco, California, October 26, 1911. [187—33]

The defendant then offered the order of the California Railroad Commission in connection with Case No. 214, dated November 20, 1911, entitled "Permission to Carriers to Continue Present Rate Bases," etc., which was objected to by the plaintiff on the ground that it was immaterial, irrelevant and incompetent, and did not show that the Railroad Commis-

sion after investigation had granted relief; plaintiff waiving objection to the offer, on the ground that it was not certified. The Court sustained the objection, and defendant excepted.

**(Exception No. 5.)**

The said order of November 20, 1911, was in words and figures as follows: [188—34]

**Exhibit No. 5.**

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

No. 214.

IN THE MATTER OF THE PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA, RELATING TO LONG AND SHORT HAULS AND THROUGH RATES EXCEEDING AGGREGATE OF INTERMEDIATE RATES.

PERMISSION TO CARRIERS TO CONTINUE PRESENT RATE BASES AND ADJUSTMENT OF RATES PENDING HEARING ON APPLICATIONS FOR RELIEF FROM PROVISIONS OF SECTION 21, ARTICLE 12, OF CONSTITUTION OF CALIFORNIA.

To All Railroads and Other Transportation Companies Within the State of California:

Permission is hereby granted to railroads and other transportation companies until January 2d, 1912, to file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission's regulations, such changes in rates

and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points; provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10th, 1911, except when a longer line or route desires to reduce rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line.

The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, [189—35] all of which rates and fares will be investigated at the hearing to be held January 2d, 1912.

By order of the Commission.

CHARLES R. DETRICK,
Secretary.

Dated San Francisco, California, November 20th, 1911.

A true copy.

[Seal] (Signed.) H. G. MATHEWSON,
Assistant Secretary Railroad Commission, State of California. [190—36]

The defendant then offered certified copies of Southern Pacific Company petitions Nos. 3, 9, 10, 30 and 40, addressed to the Railroad Commission of the State of California, asking for relief from the provisions of Section 21 of Article XII of the California Constitution as amended October 10, 1911, with respect to the rates specified in those petitions.

Mr. HARWOOD.—The objection is made to these petitions that they are irrelevant, immaterial and incompetent.

The COURT.—What are these petitions, and when were they filed?

Mr. BOOTH.—They were filed on December 30, 1911, and were filed pursuant to the order of the Commission of November 20, and the notice dated October 26, 1911, which have just been refused admission.

The COURT.—They relate to antecedent transactions, do they?

Mr. BOOTH.—They relate to the rates which were in effect on October 10, 1911, and ask permission to have those rates continued in force on account of competitive conditions compelling the lower rate for the more distant transportation.

The COURT.—The petitions were filed subsequent to the date of the charges that are here in suit, were they?

Mr. BOOTH.—Before the date of some of the charges and subsequent to the date of others.

The COURT.—Are any of the charges here sued for charges that were made after these petitions had been acted upon?

Mr. BOOTH.—These petitions may be considered to have been pending until May 27, 1912 They had not been specifically acted upon either prior to that time or since that time, except in so far as the decision in Case 116, which I am going to offer shortly, may be considered to have affected them.

The COURT.—They were never specifically acted upon? **[191—37]**

Mr. BOOTH.—No, your Honor.

The COURT.—What is the date of the last of these charges that is sued for?

Mr. HARWOOD.—May 27, 1912, your Honor.

The COURT.—The same ruling will be had as to this offer of these petitions.

Mr. BOOTH.—Exception.

**(Exception No. 6.)**

Said petitions so offered and excluded were in words and figures as follows: **[192—38]**

FORM B.

Petition No. 10. C. R. C. No. ——

SOUTHERN PACIFIC COMPANY.

(Pacific System)

FREIGHT TRAFFIC DEPARTMENT.

To the Railroad Commission of California,
San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF LOCAL FREIGHT TARIFF #37 C. R. C. NO. 12, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Col-

umn No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a general way the adjustment of rates covered by tariff C. R. C. No. 12, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as Amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further details and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul, lower rates fixed at the more distant point by competition with water car-

riers, viz.: by the California Transportation Company and "tramp" vessels.

Respectfully submitted,
SOUTHERN PACIFIC COMPANY.
By H. A. JONES,
Its Freight Traffic Manager.
By H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Feb. 25, 1914. **[193—39]**

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. | From | To | Description of Intermediate Points. | High Rate Intermediate Point. | Excess of Rate Per 100 Lbs. | More Distant Point at Which Lower Rate is Proposed. |
| Class Rates | San Francisco | Tracy | | | | |
| 1st Class | | | Rodeo<br>Bethany<br>and points between | Herdlyn | 7 | Tracy |
| Do. | | | Alston<br>Ellis<br>and points between | Cayley | 8 | Tracy |

This will also cover rates to and from points beyond and to and from intermediate points which are influenced by rates shown above.

[40]

FORM A.

Petition No. 40. C. R. C. No. ——

SOUTHERN PACIFIC COMPANY.
(Pacific System)
FREIGHT TRAFFIC DEPARTMENT.

To the Railroad Commission of California,
San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF S. P. CO. COMM. SPECIALS #16-Y C. R. C. NO. 84, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Column No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a general way the adjustment of rates covered by tariff

C. R. C. No. 84, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as Amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further details and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul over a longer line or route competitive conditions created at ..... by Pacific Coast Steamship Company and various other water-faring craft.

Respectfully submitted,
SOUTHERN PACIFIC COMPANY.
By H. A. JONES,
Its Freight Traffic Manager.
By H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Feb. 25, 1914. **[194—41]**

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. | From | To | Description of Intermediate Points. | High Rate Intermediate Point. | Excess of Rate Per 100 Lbs. | More Distant Point at Which Lower Rate is Proposed. |
| Canned Goods Carloads | San Francisco | Los Angeles | Cadwall Lingard Tropico and points between | Lancaster | 44 | Los Angeles |
| Do. | Do. | Do. | Spence Tropico and points between | Paso Robles | 16 | Los Angeles |

This will also cover rates to and from points beyond and to and from intermediate points which are influenced by rates shown above.

[42]

FORM B.

Petition No. 9. C. R. C. No. ——

SOUTHERN PACIFIC COMPANY.

(Pacific System)

FREIGHT TRAFFIC DEPARTMENT.

To the Railroad Commission of California,
San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF LOCAL FREIGHT TARIFF #37 C. R. C. NO. 12, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Column No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a general way the adjustment of rates covered by tariff

C. R. C. No. 12, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as Amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further details and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul, ~~lower rates fixed at the more distant point by competition with water carriers viz.: by the~~ over a longer line or route competitive conditions created at Tulare by A. T. & S. F. Ry. and "tramp" vessels.

Respectfully submitted,
SOUTHERN PACIFIC COMPANY.
By H. A. JONES,
Its Freight Traffic Manager.
By H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Feb. 25, 1914. **[195—43]**

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. | From | To | Description of Intermediate Points. | High Rate Intermediate Point. | Excess of Rate Per 100 Lbs. | More Distant Point at Which Lower Rate is Proposed. |
| Class Rates (1st Class) | Visalia | Tulare | Goshen Jct. | | | |
| [44] | | | Tagus | Tagus | 9 | Tulare |

FORM B.

Petition No. 3. C. R. C. No. ——

SOUTHERN PACIFIC COMPANY.

(Pacific System)

FREIGHT TRAFFIC DEPARTMENT.

To the Railroad Commission of California,
San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF LOCAL RATES OF JAN. 1, 1894, C. R. C. NO. 134, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Column No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a general way the adjustment of rates covered by tariff

C. R. C. No. 134, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as Amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further details and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul, lower rates fixed at the more distant point by competition with water carriers, viz.: by the California Transportation Company et al. and "tramp" vessels.

Respectfully submitted,
SOUTHERN PACIFIC COMPANY.
By H. A. JONES,
Its Freight Traffic Manager.
H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Feb. 25, 1914. **[196—45]**

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. | From | To | Description of Intermediate Points. | High Rate Intermediate Point. | Excess of Rate Per 100 Lbs. | More Distant Point at Which Lower Rate is Proposed. |
| Class Rates (1st Class) | San Francisco | Stockton | Rodeo<br>Bethany<br>and points between | Herdlyn | 7 | Stockton |
| | | | Alston<br>Ellis<br>and points between | Cayley | 8 | Stockton |

This will also cover rates to and from points beyond and to and from intermediate points which are influenced by rates shown above.

[46]

FORM B.

Petition No. 30. C. R. C. No. ——

SOUTHERN PACIFIC COMPANY.
(Pacific System)
FREIGHT TRAFFIC DEPARTMENT.

To the Railroad Commission of California,
San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF S. P. CO.'S NO. 659 C. R. C. NO. 805, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Column No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a general way the adjustment of rates covered by tariff

C. R. C. No. 805, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as Amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further details and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul, lower rates fixed at the more distant point by competition with water carriers, viz.: by the Pacific Coast Steamship Co.; also rail to ports, thence via Pacific Coast Steamship Company and "tramp" vessels.

Respectfully submitted,
SOUTHERN PACIFIC COMPANY.
By H. A. JONES,
Its Freight Traffic Manager.
H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Feb. 25, 1914. **[197—47]**

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. | From | To | Description of Intermediate Points. | High Rate Intermediate Point. | Excess of Rate Per 100 Lbs. | More Distant Point at Which Lower Rate is Proposed. |
| Flour, Cereal and cereal products Carloads | San Francisco | Los Angeles | Octol<br>Burr<br>Tropico and points between | Sylmar | 7½ | Los Angeles |
| Do. | Do. | Do. | Cuesta<br>Tropico and points between | Sylmar<br>Canoga<br>Burbank | 7½<br>6¾<br>4¼ | Los Angeles |
| Do. | Chico | Do. | Lingard<br>Gadwall<br>Tropico and points between | Acton | 15¼ | Do. |
| Do. | Sacramento | Santa Barbara | Edison<br>Saugus and points between | Honby | 5 | Santa Barbara |

This will also cover rates to and from points beyond and to and from intermediate points which are influenced by rates shown above.

[48]

Defendant then offered a copy of the minutes of the California Railroad Commission, of January 2, 1912:

Mr. HARWOOD.—That is a correct copy, with the exception of the reporter's transcript which is therein referred to, and that matter was covered by the stipulation which is on file.

Mr. BOOTH.—I understand no objection is made to this on the ground of lack of certification?

Mr. HARWOOD.—No.

Mr. BOOTH.—You do make the general objection to it?

Mr. HARWOOD.—Yes.

The COURT.—What is it?

Mr. BOOTH.—That is a copy of the minutes of the Railroad Commission reciting that on January 2, 1912, Case 214 came on for hearing. There was a discussion held, but no evidence introduced, nothing further done; it was postponed without day.

The COURT.—The same ruling.

Mr. BOOTH.—Exception.

**(Exception No. 7.)**

Said offer was in words and figures as follows:

**[198—49]**

In the matter of Case No. 214 entitled "In the matter of the provisions of Section 21 of Article 12 of the Constitution of California relating to long and short hauls and through rates exceeding aggregate of intermediate rates," set for hearing at this time and place, the Commission proceeded to a hearing of the same. The following appearances were entered:

C. J. Bradley of the Merchants and Manufactur-

ers' Association of Sacramento.

W. R. Wheeler and Seth Mann of the Traffic Bureau of the Merchant's Exchange.

F. R. Hill of the Fresno Traffic Association.

F. P. Gregson of the Associated Jobbers of Los Angeles.

G. W. Luce and C. W. Durbrow of the Southern Pacific Company.

Edward Chambers and H. P. Anewalt of the Atchison, Topeka & Santa Fe Railway.

E. S. Pillsbury of Wells, Fargo & Company Express.

Archibald Gray and C. H. Helting of the Western Pacific Railway.

William Henshaw of the Southern California Cement Company.

Discussion was held until 11:05 A. M.

(See Reporter's Transcript.)

It is hereby certified that the foregoing is a true copy of minutes of the meeting of the Railroad Commission of the State of California held on the 2d of January, 1912, in so for as said minutes relate to case No. 214. **[199—50]**

The defendant then offered in evidence (the plaintiff waiving objection as to lack of certification) an order of the Railroad Commission of January 16, 1912, in its Case 214, extending time for filing relief applications to February 15, 1912, which said offer was objected to by plaintiff as irrelevant, incompetent and immaterial, the objection being sustained

by the court, and defendant excepting.

**(Exception No. 8.)**

Said offer was in words and figures as follows: [200—51]

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

No. 214.

IN THE MATTER OF THE PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA RELATING TO LONG AND SHORT HAULS AND THROUGH RATES EXCEEDING AGGREGATE OF INTERMEDIATE RATES.

It is hereby ordered that the time heretofore granted to the railroad and other transportation companies of the State within which to file with this Commission new schedules removing deviations from the provisions of Section 21 of Article XII of the Constitution of this State, or in case it is decided to justify the same, or any of them, applications to be relieved from the provisions of said section, be and the same is hereby extended to February 15, 1912, at which time said schedules or applications must be filed with this Commission. As to any rate or fare as to which neither such schedule nor such application has been filed with this Commission by said date, the provisions of said section 21, Article XII, of the Constitution will at once become operative, and the lower rate or fare for a longer distance will become the maximum rate or fare for all intermedi-

ate points on the same line or route for movements in the same direction, the shorter haul being included within the longer distance, and the aggregate of the intermediate rates or fares will become the through rate or fare in cases in which the through rate or fare is now in excess of the aggregate of the intermediate rates or fares.

Until February 15, 1912, the railroad and other transportation companies may file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission's regulations such changes in rates and fares as would occur in the [201—52] ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points: Provided that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911, except when a longer line or route desires to reduce rates or fares to the most distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line. The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.

And be it further ordered that the Secretary be and he is hereby ordered to serve a copy of this order on each of said railroad and other transportation companies and to notify each of them to comply with all the requirements hereof.

Dated: January 16, 1912. [202—53]

The defendant then offered a certified copy of Decision No. 116 of the California Railroad Commission in the case of Traffic Bureau of the Merchants' Exchange vs. Southern Pacific Company, dated March 28, 1912, which said offer was objected to on the ground that it was immaterial, irrelevant, incompetent, and not made by the Commission in pursuance of the section of the Constitution in question, and not made by the Commission upon the application for relief made by the carriers, and upon the further ground that the order was not effective until all the shipments described in the complaint had moved.

The COURT.—What is this, Mr. Booth?

Mr. BOOTH.—Its only bearing in this case is the effect on the roofing paper rate; inasmuch as counsel objects upon the ground that it did not become finally effective until May 27th, and the objection is well taken and that is correct, I will stipulate to that, for the purpose of saving putting in or offering the extension order.

The COURT.—What is the purpose of the offer?

Mr. BOOTH.—The purpose of the offer is to show that these rates were under consideration by the Commission from the time the applications were filed; that they only decided with respect to one set of rates during the period covered by the complaint.

The objection was sustained, and the defendant excepted.

**(Exception No. 9.)**

Said offer was as follows: **[203—54]**

**Exhibit No. 7.**

**Decision.**

COPY.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

No. 116.

TRAFFIC BUREAU OF THE MERCHANTS' EXCHANGE,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation), and ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a Corporation),

Defendants,

ASSOCIATED JOBBERS OF LOS ANGELES, STOCKTON JOBBERS' AND MANUFACTURERS' ASSOCIATION, KERN COUNTY MERCHANTS' ASSOCIATION, FRESNO TRAFFIC ASSOCIATION,

Intervenors.

On December 24, 1910, the Railroad Commission decided Case No. 110, wherein an adjustment of the class rates between San Francisco, Stockton, and Los Angeles and San Joaquin Valley points was made, and made the effective date of the order February 15, 1911. Before this date, the Traffic Bureau of the Merchants' Exchange of San Francisco applied to the Commission for a rehearing, which application was contested by the Associated Jobbers of Los An-

geles. Thereafter and before the effective date of such order, the Commission denied the application for a rehearing. On March 2, 1911, the Traffic Bureau of the Merchants' Exchange of San Francisco filed a complaint against the Southern Pacific Company and the Atchison, Topeka and Santa Fe Railway Company in which complaint that portion of the order in Case No. 110, which provided that Stockton should have "the benefit of a differential under San Francisco equal to the existing class rates from San Francisco to Stockton upon all classes to all points involved" was attacked, and the complainant urged that it was **[204—55]** "not concerned with these arbitrary additions to said rates as they existed at the time of filing this complaint and provided that the same are left to adjustment brought about by untrammelled water competition and are not in any other manner whatsoever fixed or determined." On this theory of the proper method to make rates from San Francisco into the San Joaquin Valley, the complaint attacks all class rates from the City of Stockton to all points in the San Joaquin Valley and "charges that said rates applying from Stockton to the points named are, and each of them is, excessive, unreasonable, unjust and unlawful." Regardless of its contention, however, that the rates from San Francisco shall be left "to adjustment brought about by untrammelled water competition and are not in any other manner whatsoever fixed or determined," the complaint prays that this Commission "determine and prescribe what will be the just and reasonable rates and charges to be hereafter ob-

served and charged for the transportation of merchandise from said Cities of San Francisco and Stockton, respectively, to points in the San Joaquin Valley." Thereafter the Southern Pacific and the Atchison, Topeka & Santa Fe Railway Company filed answers denying the material allegations of the complaint. The Associated Jobbers of Los Angeles were permitted by the Commission to intervene on the question of the reasonableness of the class rates from Los Angeles to all points in the San Joaquin Valley and from all points within the San Joaquin Valley to Los Angeles, and the Stockton Jobbers' and Manufacturers' Association, the Kern County Merchants' Association and the Fresno Traffic Association were also permitted to intervene on the sole question of the reasonableness of the rates attacked in the complaint and by the Los Angeles intervenors. The case was tried by all parties on the theory that only main line points are involved.

We have therefore directly in issue all the rates on the main lines of these two carriers between Stockton and all points in the [205—56] San Joaquin Valley and between all points within the San Joaquin Valley and all other points within the San Joaquin Valley and from Los Angeles to all points in the San Joaquin Valley and from all points within the San Joaquin Valley to Los Angeles; and after careful consideration of all the evidence presented in the case, the Commission is of the opinion and finds, as a fact, that the rates in question insofar as they exceed the rates set out in the schedules hereto attached and made a part hereof, are excessive, unjust

and unreasonable, and the Commission sets out herein schedules of rates to be observed by these carriers, respectively, for the transportation of freight at class rates between the points named therein, and finds the rates set out in such schedules to be just and reasonable rates.

In order that there may be no misapprehension on the part of the carriers involved as to the scope of this decision, we have, as already indicated, prescribed the actual rates to be charged between all points involved, and as to such rates there can be no confusion. As to rates from and to points other than those involved in this decision in making such adjustments as may be made necessary by this decision, the carriers will, of course, bear in mind, the provisions of Article XII, Section 21 of the Constitution of this State preventing the charging of a greater compensation in the aggregate for the transporation of a like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer, and also that portion of the same section preventing the charging of any greater compensation as a through rate than the aggregate of the intermediate rates, and likewise Article XII, Section 20 of the Constitution preventing the increase of any rates without the permission of the Railroad Commission.

Two Schedules of class rates are attached hereto and made a part hereof. Schedule No. 1 is hereby established as just and reasonable **[206—57]** rates to be observed by the Southern Pacific Com-

pany, and Schedule No. 2 is hereby established as just and reasonable rates to be observed by the Atchison, Topeka & Santa Fe Railway Company, both of such schedules to become effective on the 27th day of April, 1912, and before such time the carriers are instructed to present to this Commission, and to distribute as required by law, printed copies of such tariffs.

Dated March 28, 1912.

San Francisco, California.

JOHN M. ESHLEMAN,
H. D. LOVELAND,
ALEX GORDON,
Commissioners.

A true copy.

[Seal] (Signed) H. G. MATHEWSON,
Assistant Secretary Railroad Commission, State of California.

(The schedule of rates herein referred to are on file in the office of the Railroad Commission of the State of California.)

It is hereby certified that the foregoing contains a full, true, and correct copy of the decision and order of the Railroad Commission of the State of California, in Case 116, Decision No. 56, decided March 28, 1912, and reported in Volume 1 of the published Opinions and Orders of said Commission at page 95 and following, with the exception of the schedules of rates referred to in said order.

It is further certified that in said schedules of rates there appeared a 5th class rate of 43 cents per 100 pounds applicable on roofing paper in carload

lots from Los Angeles to Fresno, and that said last mentioned rate was in effect June 11, 1912, and said last mentioned rate appears in Southern Pacific Company's freight tariff No. 711, California Railroad Commission No. 1515, which said last mentioned tariff was filed with this Commission and became effective according to its terms on May 27, 1912, and is now on file with this Commission.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Commission on this 3 day of April, 1915.

(Signed) CHARLES R. DETRICK, (Seal) Secretary, Railroad Commission of the State of California. [207—58]

F. W. GOMPH was recalled as a witness for the defendant:

Mr. BOOTH.—This witness' testimony, if your Honor please, and the documentary evidence I intend to offer, are addressed to the question of whether the Railroad Commission established the local rates or intermediate rates shown on Exhibit "A" prior to October 10, 1911, the rates so established being in conflict with the long and short haul clause in the Constitution as it stood up to October 10, 1911. I want to renew my question to Mr. Gomph by asking him if this letter which I show him, a certified copy of a letter which I show him, is a correct copy of a letter sent to the California Railroad Commission by the Southern Pacific Company through the witness' agency, transmitting the tariffs therein specified, and if these tariffs were filed with the Commission.

Mr. HARWOOD.—That is objected to as immaterial, irrelevant and incompetent.

The COURT.—That is simply for the purpose of showing that they did establish these tariffs prior to the amendment to the Constitution?

Mr. BOOTH.—Yes, your Honor.

The COURT.—I do not see the materiality of it. What is the materiality of it?

Mr. BOOTH.—The materiality of it is to follow it up by an order of the Commission dated June 11, 1909, establishing all tariffs on file with it as to the rates for transportation of freight and passengers between points in the State.

The COURT.—Of course, that order as well as this offer occurred before the amendment to the Constitution?

Mr. BOOTH.—Yes, your Honor.

The COURT.—The objection will be sustained.

Mr. BOOTH.—Exception. The letter of May 7, 1909, may be marked for identificaiton.

The COURT.—Yes.

**Exception No. 10.**

Said letter was as follows: [208—59]

**Exhibit No. 2.**

(COPY)

ACT Z–11713

May 7th, 1909.

Board of Railroad Commissioners,
San Francisco, Cal.

Gentlemen:—We beg to acknowledge receipt of your favor of April 26th, in regard to filing Tariffs with your Board;

We have placed a C. R. C. No. on the upper margin of all Tariffs and Circulars which name rates or rules and regulations affecting rates on traffic having both origin and destination within the State of California, and are handing you herewith all such issues published by the Southern Pacific Co. which are in effect on this date. The Tariffs are numbered consecutively with the lowest number on the bottom, and all supplements have been placed within each Tariff or attached to same in a secure manner which will enable you to readily place our entire issue in your files. It is understood that where other lines have issued Joint Tariffs in connection with the Southern Pacific Co. under proper concurrence, the issuing line only files such Tariffs with your Board, and that it is not necessary for other lines parties to such joint Tariffs to also file same under their individual C. R. C. No. which would only result in endless duplication of Tariffs in your files. Have asked the Chairman of the Western Classification Committee, and Mr. Mote of the Pacific Car Service Bureau, to file the Western Classification and the Car Demurrage Tariff with you direct for our account.

Following is a detailed statement of tariffs enclosed herewith, showing C. R. C. No., Tariff No., and Supplements by both C. R. C. No. and Tariff No.

Will you please favor us with a receipt for all of these issued. This communication is sent you in duplicate, so that it may be used to check our figures, and serve to return one copy to us as a receipt for the publications. **[209—60]**

| C. R. C. No. | | Tariff No. | Supplements. C. R. C. No. | Tariff No. |
|---|---|---|---|---|
| 1 | L. F. T. | 1 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37. | 67, 71, 74, 75, 76, 79, 8 83, 84, 87, 88, 89, 9 91, 93, 94, 95, 97, 9 100, 101, 102, 103, 10 105, 106, 107, 108, 10 110, 111, 112, 113, 11 115, 116, 117. |
| 2 | L. F. T. | 3 | 1, 2, 3, | 1, 2, 3. |
| 3 | L. F. T. | 4–A | | |
| 4 | L. F. T. | 5 | 1, | 2 |
| 5 | L. F. T. | 9–A | 1, 2, | 3, 4 |
| 6 | L. F. T. | 10–A | 1, 2, 3. | 4, 5, 6, |
| 7 | L. F. T. | 14–A | 1, 2, | 3, 4 |
| 8 | L. F. T. | 28–B | | |
| 9 | L. F. T. | 34–C | | |
| 10 | L. F. T. | 35 | | |
| 11 | L. F. T. | 36 | | |
| 12 | L. F. T. | 37 | 1, 2, | 3, 7, |
| 13 | L. F. T. | 39 | 1, | 1, |
| 14 | L. F. T. | 61–C | | |
| 15 | L. F. T. | 63–A | 1, | 1, |
| 16 | J. F. T. | 75 | 1, 2, | 2, 3, |
| 17 | L. F. T. | 79–B | | |
| 18 | J. F. T. | 83–A | | |
| 19 | J. F. T. | 84 | 1, 2, | 3, 4, |
| 20 | J. F. T. | 92 | 1, 2, | 4, 5 |
| 21 | L. F. T. | 102 | 1, 2, | 1, 3 |
| 22 | L. F. T. | 121–A | 1, 2, | 4, 5 |
| 23 | J. F. T. | 134–B | | |
| 24 | J. F. T. | 153–B | 1, | 1, |
| 25 | L. F. T. | 181–A | | |
| 26 | J. F. T. | 183–A | | |
| 27 | L. F. T. | 193 | 1, 2, | 2, 3 |
| 28 | L. F. T. | 195 | | |
| 29 | L. F. T. | 201–A | | |
| 30 | T. T. | 230–D | 1, | 1, |
| 31 | L. F. T. | 251–A | 1, | 3, |
| 32 | J. F. T. | 276–B | 1, 2, 3. | 1, 2, 3, |
| 33 | C. T. | 291–C | | |
| 34 | L. F. T. | 298 | | |
| 35 | L. F. T. | 301 | | |
| 36 | J. F. T. | 305 | 1, | 3, |
| 37 | L. F. T. | 316–B | | |
| 38 | J. F. T. | 320–A | | |
| 39 | J. F. T. | 322–A | | |
| 40 | J. F. T. | 327–A | | |
| 41 | L. F. T. | 330–B | 1, 2, 3. | 1, 2, 3, |
| 42 | L. F. T. | 332 | 1, 2, | 1, 2 |
| 43 | L. F. T. | 335–B | 1, 2, 3. | 1, 2, 3, |
| 44 | J. F. T. | 336 | | |
| 45 | L. F. T. | 339–B | | |
| 46 | J. F. T. | 340–A | | |

| . R. C. No. | | Tariff No. | Supplements. C. R. C. No. | Tariff No. |
|---|---|---|---|---|
| 47 | L. F. T. | 348–B | | |
| 48 | J. F. T. | 349–B | | |
| 49 | L. F. T. | 350–C | | |
| 50 | L. F. T. | 353–A | | |
| 51 | J. F. T. | 358 | | |
| 52 | L. F. T. | 360–D | | |
| 53 | L. F. T. | 362 | | |
| 54 | J. F. T. | 374 | 1, | 2 |
| 55 | L. F. T. | 380–A | 1, | 1, |
| 56 | L. F. T. | 381 | | |
| 57 | L. F. T. | 382–A | | |
| 58 | L. F. T. | 383–B | | |
| 59 | J. F. T. | 384 | | |
| 60 | J. F. T. | 404–A | 1, 2, 3. | 1, 2, 3, |
| 61 | L. F. T. | 421 | 1, 2, | 1, 2 |
| 62 | L. F. T. | 440 | 1, | 1, |
| 63 | L. F. T. | 441 | 1, | 1, |
| 64 | L. F. T. | 442 | 1, | 4 |
| 65 | J. F. T. | 446–A | 1, | 2 |
| 66 | J. F. T. | 469 | 1, | 1, |
| 67 | J. F. T. | 473 | | |
| 68 | J. F. T. | 474 | 1, | 1, |
| 69 | J. F. T. | 475 | | |
| 70 | L. F. T. | 476 | | |
| 71 | L. F. T. | 477 | | |
| 72 | J. F. T. | 478 | | |
| 73 | J. F. T. | 490 | | |
| 74 | J. F. T. | 491–A | | |
| 75 | J. F. T. | 505 | | |
| 76 | J. F. T. | 511 | | |
| 77 | L. F. T. | 523 | 1, | 1, |
| 78 | Com. Trf. | 6 | 1, | 3, |
| 79 | " " | 7 | 1, | 10 |
| 80 | " " | 9 | 1, 2, 3. | 3, 9, 12 |
| 81 | " " | 73–G | 1, 2, 3. | 6, 7, 8 |
| 82 | " " | 78–G | 1, 2, 3. | 7, 10, 12 |
| 83 | " " | 82–G | 1, 2, 3. | 1, 8, 10 |
| 84 | Com. Specls. | 16–Y | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, | 1, 3, 11, 19, 24, 26, 29, 31, 33, 35, 36, 37, 38, 42, 43, 44, 45 |
| 85 | Jt. Com. Trf. | 4–NCNG | 1, 2, 3, 4, 5, 6, 7, | 1, 2, 3, 4, 5, 6, 7, |
| 86 | " Mdse. " | 5–NCNG | 1, 2, 3. | 1, 3, 4 |
| 87 | " " " | 11–S. Ry. | 1, 2, 3, 4, | 2, 3, 4, 5 |
| 88 | " Com. " | 13–S. Ry. | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, | 1, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17 |
| 89 | Mdse. Trf. | 74–G | 1, 2, | 4, 6 |
| 90 | Merchandise Tariff | 75–G | 1, 2, | 2, 4 |
| 91 | Merchandise Tariff | 76–G | 1, 2, 3. | 5, 9, 10 |
| 92 | Merchandise Tariff | 85–G | 1, 2, 3, 4, | 1, 4, 6, 7 |
| 93 | Merchandise Tariff | 86–G | | |
| 94 | Merchandise Tariff | 87–G | | |
| 95 | Merchandise Tariff | 9–V | 1, | 6 |
| 96 | Special. Com. Tariff | 19–Y | 1, 2, 3, 4, | 12, 14, 15, 16 |
| 97 | Flour Specials | 3 | 1, 2, 3, 4, 5, | 1, 4, 14, 15, 16 |
| 98 | Flour Tariff | 3 | 1, 2, 3, 4, 5, 6, 7, 8, | 15, 16, 17, 21, 24, 25, 26, 27 |
| 99 | Fruit Specials | 4 | 1, 2, 3, 4, 5, 6, 7, | 1, 9, 10, 11, 15, 16, 17 |

| C. R. C. No. | | Tariff No. | Supplements. C. R. C. No. | Tariff No. |
|---|---|---|---|---|
| 100 | Fruit Tariff | 4 | 1, 2, 3. | 4, 5, 6, |
| 101 | Grain Specials | 4 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, | 1, 5, 10, 11, 12, 14, 15, 17, 18, 19 |
| 102 | Grain Tariff | 4 | 1, 2, 3, 4, 5, 6, 7, | 16, 25, 28, 29, 30, 32, 33 1, 6, 12, 14, 15, 16, 18, |
| 103 | Hay & Straw Spl. | 3 | 1, 2, 3, 4, 5, 6, 7, 8, 9, | 19, 20 |
| 104 | Hay & Straw Tariff | 6 | 1, 2, 3, 4, | 3, 8, 10, 11 |
| 105 | Ice Specials | 3 | 1, 2, 3, 4, | 1, 10, 12, 14 |
| 106 | Ice Tariff | 8 | 1, 2, | 1, 2 |
| 107 | Live Stock Specials | 3 | 1, 2, 3, 4, 5, 6, 7, | 4, 9, 11, 12, 14, 16, 17 |
| 108 | Live Stock Tariff | 6 | 1, 2, 3, 4, 5, 6, 7, | 1, 3, 7, 9, 11, 12, 13 |
| 109 | Lumber Specials | 3 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, | 1, 7, 14, 17, 18, 19, 21, 22, 23 |
| 110 | Lumber Tariff | 3 | 1, 2, 3, 4, 5, 6, | 1, 8, 9, 10, 13, 14 |
| 111 | Ore Specials | 3 | 1, 2, 3, 4, 5, 6, 7, | 6, 7, 15, 16, 20, 21, 22 |
| 112 | Ore Tariff | 3 | 1, 2, 3, 4, | 16, 17, 18, 19 |
| 113 | Placerville Com. Trf. | 1 | 1, 2, 3, 4, 5, 6, | 1, 2, 3, 4, 5, 6 |
| 114 | Switching Tariff | 1 | | |
| 115 | Switching Tariff | 2 | | |
| 116 | Vegetable Specials | 3 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, | 8, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23 |
| 117 | Vegetable Tariff | 4 | 1, | 5 |
| 118 | Spl. Wine Tariff | 1 | 1, 2, 3. | 1, 2, 3, |
| 119 | Spl. Wine Tariff | 2 | 1, 2, 3, 4, 5, 6, 7, | 1, 2, 3, 4, 5, 6, 7 |
| 120 | Spl. Wine Tariff | 3 | 1, 2, 3. | 1, 2, 3, |
| 121 | Spl. Wine Tariff | 4 | 1, 2, 3, 4, | 1, 2, 3, 4 |
| 122 | Spl. Wine Tariff | 5 | 1, 2, | 1, 2, |
| 123 | Spl. Wine Tariff | 6 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 |
| 124 | Spl. Wine Tariff | 8 | 1, | 1, |
| 125 | Spl. Wine Tariff | 9–A | | |
| 126 | Spl. Wine Tariff | 10 | 1, | 1, |
| 127 | Wood Specials | 3 | 1, 2, 3, 4, 5, 6, 7, | 6, 12, 14, 15, 16, 18, 19 |
| 128 | Wood Tariff | 2 | 1, 2, 3, 4, | 3, 6, 10, 11 |
| 129 | Exception Sheet | 2 | 1, | 2 |
| 130 | Jt. Special Rate | 153 | 1, 2, | 1, 2 |
| 131 | Jt. Special Rate | 157 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, | 2, 8, 10, 13, 15, 20, 25, 26, 27, 28 |
| 132 | Jt. Special Rate | 162 | 1, 2, | 1, 2 |
| 133 | Jt. Special Rate | 189 | 1, | 14 |
| 134 | Local Rates of 1894 | | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15; | H, I, J, K, M, N, O, P, Q, R, S, T, V, W |
| 135 | Local Rates | 135 | 1, 2, 3, 4, 5, 6, 7, 8, | 6, 14, 16, 21, 23, 24, 25, 26 |
| 136 | Local | 138 | | |
| 137 | Spcl. Frt. Tariff | 24 | | |
| 138 | Spcl. Frt. Tariff | 214–A | | |
| 139 | Special Freight Tariff | 219 | | |
| 140 | Special Freight Tariff | 236 | | |
| 141 | Special Freight Tariff | 286 | | |
| 142 | Special Freight Tariff | 296 | | |
| 143 | Special Freight Tariff | 301 | | |
| 144 | Special Freight Tariff | 310 | | |
| 145 | Special Freight Tariff | 311 | | |

Supplements.

| C. R. C. No. | | Tariff No. | C. R. C. No. | Tariff No. |
|---|---|---|---|---|
| 146 | Special Freight Tariff | 312 | | |
| 147 | Special Freight Tariff | 314 | | |
| 148 | Special Freight Tariff | 315 | | |
| 149 | Special Freight Tariff | 338 | | |
| 150 | Special Freight Tariff | 341 | | |
| 151 | Special Freight Tariff | 342 | | |
| 152 | Special Freight Tariff | 343–A | | |
| 153 | Special Freight Tariff | 348 | | |
| 154 | Special Freight Tariff | 349 | | |
| 155 | Special Freight Tariff | 356 | | |
| 156 | Special Freight Tariff | 367 | | |
| 157 | Special Freight Tariff | 371 | | |
| 158 | Special Freight Tariff | 386–A | | |
| 159 | Special Freight Tariff | 387–A | | |
| 160 | Special Freight Tariff | 388–A | | |
| 161 | Special Freight Tariff | 400 | | |
| 162 | Special Freight Tariff | 405 | | |
| 163 | Special Freight Tariff | 413 | | |
| 164 | Special Freight Tariff | 421 | | |
| 165 | Special Freight Tariff | 423 | | |
| 166 | Special Freight Tariff | 424 | | |
| 167 | Special Freight Tariff | 436 | | |
| 168 | Special Freight Tariff | 438–A | | |
| 169 | Special Freight Tariff | 444 | | |
| 170 | Special Freight Tariff | 451 | | |
| 171 | Special Freight Tariff | 454–A | | |
| 172 | Special Freight Tariff | 457 | | |
| 173 | Special Freight Tariff | 528 | | |
| 174 | Special Freight Tariff | 541 | | |
| 175 | Special Freight Tariff | 542 | | |
| 176 | Special Freight Tariff | 543 | | |
| 177 | Special Freight Tariff | 544 | | |
| 178 | Special Freight Tariff | 545 | | |
| 179 | Special Freight Tariff | 546 | | |
| 180 | Special Freight Tariff | 547 | | |
| 181 | Special Freight Tariff | 549–A | | |
| 182 | Special Freight Tariff | 550 | | |
| 183 | Special Freight Tariff | 551 | | |
| 184 | Special Freight Tariff | 552 | | |
| 185 | Special Freight Tariff | 553 | | |
| 186 | Special Freight Tariff | 554 | | |
| 187 | Special Freight Tariff | 555 | | |
| 188 | Special Freight Tariff | 559 | | |
| 189 | Special Freight Tariff | 577 | | |
| 190 | Special Freight Tariff | 591 | | |
| 191 | Special Freight Tariff | 594 | | |
| 192 | Special Freight Tariff | 597 | | |
| 193 | Special Freight Tariff | 598 | | |
| 194 | Special Freight Tariff | 599 | | |
| 195 | Special Freight Tariff | 600 | | |
| 196 | Special Freight Tariff | 602 | | |
| 197 | Special Freight Tariff | 622 | | |
| 198 | Special Freight Tariff | 626 | | |
| 199 | Special Freight Tariff | 627 | | |
| 200 | Special Freight Tariff | 630 | | |
| 201 | Special Freight Tariff | 634 | | |
| 202 | Special Freight Tariff | 635 | | |
| 203 | Special Freight Tariff | 644 | | |
| 204 | Special Freight Tariff | 669 | | |

| C. R. C. No. | | Tariff No. |
|---|---|---|
| 205 | Special Freight Tariff | 670 |
| 206 | Special Freight Tariff | 672 |
| 207 | Special Freight Tariff | 674 |
| 208 | Special Freight Tariff | 675 |
| 209 | Special Freight Tariff | 687 |
| 210 | Special Freight Tariff | 688 |
| 211 | Special Freight Tariff | 689 |
| 212 | Special Freight Tariff | 697 |
| 213 | Special Freight Tariff | 703 |
| 214 | Special Freight Tariff | 704 |
| 215 | Special Freight Tariff | 705 |
| 216 | Special Freight Tariff | 706 |
| 217 | Special Freight Tariff | 712 |
| 218 | Special Freight Tariff | 716 |
| 219 | Special Freight Tariff | 718 |
| 220 | Special Freight Tariff | 720 |
| 221 | Special Freight Tariff | 721 |
| 222 | Special Freight Tariff | 722 |
| 223 | Special Freight Tariff | 723 |
| 224 | Special Freight Tariff | 724 |
| 225 | Special Freight Tariff | 725 |
| 226 | Special Freight Tariff | 726 |
| 227 | Special Freight Tariff | 727–B |
| 228 | Special Freight Tariff | 731 |
| 229 | Special Freight Tariff | 733 |
| 230 | Special Freight Tariff | 734 |
| 231 | Special Freight Tariff Joint | 736 |
| 232 | Special Freight Tariff | 737 |
| 233 | Special Freight Tariff | 739 |
| 234 | Special Freight Tariff | 740 |
| 235 | Special Freight Tariff | 741 |
| 236 | Special Freight Tariff | 742 |
| 237 | Special Freight Tariff | 744 |
| 238 | Special Freight Tariff | 748 |
| 239 | Spl. Joint Frt. Tariff | 749 |
| 240 | Special Freight Tariff | 750 |
| 241 | Special Freight Tariff | 751 |
| 242 | Special Freight Tariff | 752 |
| 243 | Special Freight Tariff | 753–A |
| 244 | Special Freight Tariff | 755 |
| 245 | Special Freight Tariff | 756 |
| 246 | Special Freight Tariff | 757 |
| 247 | Special Freight Tariff | 758 |
| 248 | Special Freight Tariff | 760 |
| 249 | Special Freight Tariff | 761 |
| 250 | Special Freight Tariff | 762 |
| 251 | Special Freight Tariff | 763 |
| 252 | Special Freight Tariff | 765–A |
| 253 | Special Freight Tariff | 767 |
| 254 | Special Freight Tariff | 768 |
| 255 | Special Freight Tariff | 770–A |
| 256 | Special Freight Tariff | 772 |
| 257 | Special Freight Tariff | 773 |
| 258 | Special Freight Tariff | 774 |
| 259 | Special Freight Tariff | 776 |
| 260 | Special Freight Tariff | 777 |
| 261 | Special Freight Tariff | 779 |
| 262 | Special Freight Tariff | 781 |
| 263 | Special Freight Tariff | 782 |

Supplements.

| C. R. C. No. | Tariff No. |
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| C. R. C. No. | | Tariff No. |
|---|---|---|
| 264 | Special Freight Tariff | 783 |
| 265 | Special Freight Tariff | 785 |
| 266 | Spl. Jt. Frt. Tariff | 786 |
| 267 | Special Freight Tariff | 788 |
| 268 | Special Freight Tariff | 789 |
| 269 | Special Freight Tariff | 793 |
| 270 | Special Freight Tariff | 794 |
| 271 | Special Freight Tariff | 795 |
| 272 | Special Freight Tariff | 796 |
| 273 | Special Freight Tariff | 797 |
| 274 | Special Jt. Frt. Tariff | 801 |
| 275 | Special Freight Tariff | 803 |
| 276 | Special Freight Tariff | 804 |
| 277 | Special Freight Tariff | 805 |
| 278 | Special Freight Tariff | 806 |
| 279 | Special Freight Tariff | 809 |
| 280 | Special Freight Tariff | 810 |
| 281 | Special Freight Tariff | 812 |
| 282 | Special Freight Tariff | 813 |
| 283 | Special Freight Tariff | 814–A |
| 284 | Special Freight Tariff | 816 |
| 285 | Special Freight Tariff | 817 |
| 286 | Special Freight Tariff | 818 |
| 287 | Special Freight Tariff | 819–A |
| 288 | Special Freight Tariff | 820 |
| 289 | Special Freight Tariff | 822 |
| 290 | Special Freight Tariff | 823 |
| 291 | Special Freight Tariff | 824 |
| 292 | Special Freight Tariff | 825–A |
| 293 | Special Freight Tariff | 826 |
| 294 | Special Freight Tariff | 827 |
| 295 | Special Freight Tariff | 828 |
| 296 | Special Freight Tariff | 829 |
| 297 | Special Freight Tariff | 830 |
| 298 | Special Freight Tariff | 831 |
| 299 | Special Freight Tariff | 832 |
| 300 | Special Freight Tariff | 833 |
| 301 | Special Joint Freight Tariff | 834–A |
| 302 | Special Freight Tariff | 835 |
| 303 | Special Freight Tariff | 837 |
| 304 | Special Freight Tariff | 840 |
| 305 | Special Freight Tariff | 841 |
| 306 | Special Freight Tariff | 842 |
| 307 | Special Freight Tariff | 843 |
| 308 | Special Freight Tariff | 844 |
| 309 | Special Freight Tariff | 845 |
| 310 | Special Freight Tariff | 846 |
| 311 | Special Freight Tariff | 847 |
| 312 | Special Freight Tariff | 848 |
| 313 | Special Freight Tariff | 849 |
| 314 | Special Freight Tariff | 850 |
| 315 | Special Freight Tariff | 851 |
| 316 | Special Freight Tariff | 852 |
| 317 | Special Freight Tariff | 853 |
| 318 | Special Freight Tariff | 854 |
| 319 | Special Freight Tariff | 858 |
| 320 | Special Freight Tariff | 859 |
| 321 | Special Freight Tariff | 860 |
| 822 | Special Freight Tariff | 862 |
| 323 | Special Freight Tariff | 863 |
| 324 | Special Freight Tariff | 864 |

| C. R. C. No. | | Tariff No. | Supplements. C. R. C. No. | Tariff No. |
|---|---|---|---|---|
| 325 | Special Freight Tariff | 865–A | | |
| 326 | Special Freight Tariff | 866 | | |
| 327 | Special Freigh tTariff | 867 | | |
| 328 | Special Freight Tariff | 868 | | |
| 329 | Special Freight Tariff | 869 | | |
| 330 | Special Freight Tariff | 870 | | |
| 331 | Special Freight Tariff | 871 | | |
| 332 | Special Freight Tariff | 872 | | |
| 333 | Special Freight Tariff | 873 | | |
| 334 | Special Freight Tariff | 876 | | |
| 335 | Special Freight Tariff | 878 | | |
| 336 | Special Freight Tariff | 879 | | |
| 337 | Special Freight Tariff | 880 | | |
| 338 | Special Freight Tariff | 881 | | |
| 339 | Special Freight Tariff | 883 | | |
| 340 | Special Freight Tariff | 884 | | |
| 341 | Special Freight Tariff | 885 | | |
| 342 | Special Freight Tariff | 886 | | |
| 343 | Special Freight Tariff | 887 | | |
| 344 | Special Freight Tariff | 888 | | |
| 345 | Special Freight Tariff | 889 | | |
| 346 | Special Freight Tariff | 890 | | |
| 347 | Special Jt. Frt. Tariff | 892 | | |
| 348 | Special Freight Tariff | 895 | | |
| 349 | Special Freight Tariff | 898 | | |
| 350 | Special Freight Tariff | 899 | | |
| 351 | Special Freight Tariff | 900 | | |
| 352 | Special Freight Tariff | 3–TAG | 1 | 1 |
| 353 | Special Freight Tariff | 15–TAG | | |
| 354 | Special Freight Tariff | 20–TAG | | |
| 355 | Special Freight Tariff | 22–TAG | | |
| 356 | Special Freight Tariff | 23–TAG | | |
| 357 | Special Freight Tariff | 27–TAG | | |
| 358 | Special Freight Tariff | 29–TAG | | |
| 359 | Special Freight Tariff | 31–TAG | | |
| 360 | Special Freight Tariff | 33–TAG | | |
| 361 | Special Freight Tariff | 36–TAG | | |
| 362 | Special Freight Tariff | 39–TAG | | |
| 363 | Special Freight Tariff | 42–TAG | | |
| 364 | Special Freight Tariff | 44–TAG | | |
| 365 | Special Freight Tariff | 45–TAG | | |
| 366 | Special Freight Tariff | 47–TAG | | |
| 367 | Special Freight Tariff | 49–TAG | | |
| 368 | Special Freight Tariff | 50–TAG | | |
| 369 | Special Freight Tariff | 51–TAG | | |
| 370 | Special Freight Tariff | 52–TAG | | |
| 371 | Special Freight Tariff | 53–TAG | | |
| 372 | Special Freight Tariff | 54–TAG | | |
| 373 | Special Freight Tariff | 57–TAG | | |
| 374 | Special Freight Tariff | 58–TAG | | |
| 375 | Special Freight Tariff | 59–TAG | | |
| 376 | SpecialFreight Tariff | 59½–TAG | | |
| 377 | Special Freight Tariff | 60–TAG | | |
| 378 | Special Freight Tariff | 61–TAG | | |
| 379 | Special Freight Tariff | 62–TAG | | |
| 380 | Special Freight Tariff | 63–TAG | | |
| 381 | Special Freight Tariff | 64–TAG | | |
| 382 | Special Freight Tariff | 65–TAG | | |
| 383 | Local Rate | 116 | | |
| 384 | Circular GFD | 98 | 1 | 1 |
| 385 | " " | 120–J | | |

| C. R. C. No. | | Tariff No. | Supplements. C. R. C. No. | Tariff No. |
|---|---|---|---|---|
| 386 | Circular GFD | 121-B | 1, 2, 3. | 2, 3, 4, |
| 387 | " " | 124 | | |
| | to 184 inclusive | | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, | 1–129, 1–132 1–135, 1–139, 1–141, 1–147, 1–148, 1–152, 1–153, 1–158, 1–170, 1–173 |
| 388 | Circular GFD | 186-K | 1, 2, | 3, 5 |
| 389 | " " | 188-A | 1, 2, 3, 4, 5, | 76, 80, 89, 104, 105 |
| 390 | " " | 195 | | |
| 391 | " " | 197-B | 1 | 1 |
| 392 | " " | 204-B | | |
| 393 | " " | 207-B | | |
| 394 | " " | 210 | 1 | 1, |
| 395 | " " | 212-B | | |
| 396 | " " | 216 | | |
| 397 | Circular Letter | 319 | | |
| 398 | " " | 335 | | |

Yours truly,
H. A. JONES. (Signed.)
F. W. G.

GHR.

RECEIVED
May 8, 1909,
BOARD OF RAILROAD COMMISSIONERS.
W. D. WAGNER. (Signed.)
**[217—68]**

Mr. BOOTH.—Now, if your Honor please, following up that question, we offer to show by this witness that all of the tariffs of the Southern Pacific Company relative to the movement of freight in California, were actually filed with and remained on file with the Commission until the Commission entered an order, which I shall offer, on June 11, 1909, approving the tariffs on file with it.

Mr. HARWOOD.—I object to the offer on the ground that it is immaterial, irrelevant and incompetent.

Mr. BOOTH.—I simply want to connect up the dates. That is all.

The COURT.—The objection will be sustained.

Mr. BOOTH.—Exception.

**Exception No. 11.**

The defendant then offered a certified copy of the order of the Railroad Commission of the State of California, dated June 11, 1909, approving the rates, fares and charges of the carriers named in the order, to which plaintiff objected on the ground that the order was irrelevant, immaterial and incompetent, to which ruling the defendant excepted.

**Exception No. 12.**

Said order was in words and figures as follows: **[218—69]**

**Exhibit No. 3.**

SPECIAL MEETING.

Friday, June 11th, 1909.

OFFICE OF THE BOARD OF RAILROAD COMMISSIONERS.

Room 10—Ferry Building San Francisco, Cal.

June 11, 1909.

Pursuant to a resolution adopted by this Commission, June 1st, 1909, the Board met in special session at 10 o'clock A. M. on the above.

PRESENT:

COMMISSIONERS—Irwin—Loveland and Summerland and Secretary Wagner.

On motion of Commissioner Loveland, duly seconded by Commissioner Summerland, the following resolution was unanimously adopted:

WHEREAS, pursuant to and in conformity with a resolution of this Board adopted at the meeting of March 30, 1909, certain carriers to wit:

Northern Electric Railway Company.
Ocean Shore Railway Company.
Los Angeles & Redondo Railway Company.
Nevada & California Railway Company.
Sunset Western Railway Company.
Sunset Railroad Company.
Bay Point & Clayton Railroad Company.
Tonopah & Tidewater Railroad Company.
California Transportation Company.
The Pullman Company.
California Railway.
Los Angeles Pacific Company.

Nevada-California-Oregon & Sierra Valleys Railway Co.
Pacific Car Service Bureau.
Sierra Railway of California.
South San Francisco Belt Railway Company.
Colusa & Lake Railroad Company.
Arcata & Mad River Railroad Company.
Richmond Belt Railway Company.
Sugar Pine Railway Company.
Los Angeles & San Diego Beach Railway Company.
Nevada County Narrow Gauge Railroad Company.
Lake Tahoe Railway & Transportation Company.
San Diego Southern Railway Company.
Stone Canon Pacific Railroad Company.
Butte County Railroad Company.
San Diego, Cuyamaca & Eastern Railway Company.
Oregon & Eureka Railroad Company.
Amador Central Railroad Company.
San Francisco, Oakland & San Jose Consolidated Railroad Company. **[219—70]**
Iron Mountain Railway Company.
McCloud River Railroad Company.
Petaluma & Santa Rosa Transportation Company.
San Pedro, Los Angeles & Salt Lake Railroad Company.
Atchison, Topeka & Santa Fe Railway Company.

Diamond & Caldor Railway Company.
Southern Pacific Company.
Western Pacific Railway Company.
Wells Fargo & Company Express.
Trans-Continental Scrip Bureau.

have each filed with this Commission, a printed copy, open to public inspection, of schedules, showing the rates, fares and charges of said carriers respectively for transportation of freight and passengers within this State, between different points on their own routes and between points on their own routes and the routes of any other transportation company, when a through or joint rate is in force, and also a like printed copy of schedules for charges for services in connection with the receipt, delivery, transfer in transit, ventilation, refrigeration, icing, storing and handling of property by said carriers respectively.

IT IS THEREFORE RESOLVED, that the aforesaid schedules be and they are hereby received and filed by this Commission as the rates, fares and charges, and joint rates, fares and charges, to the extent that any thereof are joint, which have been made and filed by said carriers respectively, pursuant to the provisions of Section 18 of the Act of the Legislature of this State approved March 20, 1909; and that the said rates, fares and charges shall be published by said carriers respectively as required by the said Act, and shall be the lawful rates, fares and charges of said carriers respectively, subject to be changed as in said section provided, or by this

Commission pursuant to the provisions of Section 19 of the aforesaid Act.

(Seal) A true copy.

H. G. MATHEWSON, (Signed.)

Assistant Secretary Railroad Commission, State of California. [220—71]

**[Testimony of J. K. Butler for Defendant.]**

J. K. BUTLER was duly sworn as a witness for defendant, and testified as follows:

The WITNESS.—I am assistant general freight agent of the defendant, and have been connected with the freight department of defendant since 1909 continuously, and for different periods since 1903, and am familiar with the local and through rates involved in this case.

Mr. BOOTH.—Now, if the Court please, I do not want to appear pertinacious in the case, but it appeared to me that perhaps under the general denials it might not be out of the way to offer evidence on the water competition, as to which, on the special defense the Court has ruled against us.

The COURT.—I think that your right would be fully covered in that regard by the orders sustaining the demurrer to your answer.

Mr. BOOTH.—I want to show by this witness that in his opinion as a freight traffic man the rates charged plaintiff's assignors in this case were reasonable in and of themselves for the service performed, and furthermore that the through rate which is contended for here was a rate less than a reasonable rate in and of itself for the service to be performed under the through rate, and was com-

pelled by actual water competition between the port of San Francisco and the ports tributary to Los Angeles.

The COURT.—Why not make that offer?

Mr. BOOTH.—I do make that offer now.

Mr. HARWOOD.—Objected to upon the ground that it is immaterial, irrelevant and incompetent.

The COURT.—In my view, under the provisions of the constitution existing at the time, it is wholly irrelevant. I do not see how it can be considered. The objection will be sustained. Your offer will, of course, stand. [221—72]

**Exception No. 13.**

Mr. BOOTH.—Exception. That is all with Mr. Butler. If your Honor please, before closing I want to ask the Court for special findings in the case. That is the case for the defendant.

The COURT.—The case involves the same questions that were considered on demurrer, and judgment will have to go for the plaintiff in accordance with the prayer of the complaint.

**Order [Settling, etc., Bill of Exceptions].**

Thereupon, and on the 2d day of June, 1915, said Court made and entered findings of fact and conclusions of law, thereon, and upon said findings of fact and conclusions of law, and on the 2d day of June, 1913, a judgment was entered against the said defendant and in favor of the said plaintiff, in the sum of $3,928.01, with interest and costs, as prayed for in the complaint. Within the time allowed by law this bill of exceptions was served on counsel for plaintiff, and was filed herein.

WHEREUPON the Court, being willing to preserve the record in order that its rulings may be reviewed for error, if any there be, hereby certifies that the foregoing bill of exceptions contains all of the evidence offered or admitted upon the trial of said cause, together with the rulings of the Court thereon and the rulings of the Court in admitting or excluding testimony at said trial, and the exceptions taken to the rulings of the Court, and the exceptions allowed thereon.

It is further certified that all of the exhibits offered or admitted in said cause are made a part of the foregoing bill of exceptions.

**[Order Settling the Foregoing Bill of Exceptions.]**

WHEREUPON, said bill of exceptions is hereby settled, certified and signed, this 14th day of June, 1915, as correct in all respects and presented in due time.

WM. C. VAN FLEET,
Judge of said Court. [222—73]

**[Stipulation re Settling, etc., of Bill of Exceptions.]**

IT IS HEREBY STIPULATED between counsel for the parties to the action entitled as above, that the foregoing bill of exceptions, as tendered to said Court by the defendant, may by said Court be settled, allowed, certified and signed, without amendment.

Dated this 12th day of June, 1915.

HOEFLER COOK HARWOOD & MORRIS,

ALFRED J. HARWOOD,
Attorneys for Plaintiff.

HENLEY C. BOOTH,
GEORGE D. SQUIRES,
FRANK B. AUSTIN,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 14, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [223—74]

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*In the District Court of the United States in and for the Northern District of California, Second Division.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Petition for Writ of Error.**

To the Honorable WILLIAM C. VAN FLEET, Judge of the Above-entitled Court, and to the Judge or Judges of Said District Court:

Now comes the above-named defendant, Southern Pacific Company, a corporation, by Henley C. Booth,

George D. Squires and Frank B. Austin, its attorneys, and says:

That on or about the second day of June, 1915, this Court entered a judgment herein, in favor of plaintiff and against defendant, in which judgment and the proceedings prior thereunto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition:

WHEREFORE, defendant prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be [224] sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 29th day of July, 1915.

HENLEY C. BOOTH,
GEO. D. SQUIRES,
FRANK B. AUSTIN,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 29, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [225]

*In the District Court of the United States in and for the Northern District of California, First Division.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Assignment of Errors.**

Now comes the above-named defendant, Southern Pacific Company, a corporation, and in connection with its petition for a writ of error makes the following assignment of errors, which it avers were committed by the Court upon the trial of this cause and in the rendition of the judgment against defendant appearing upon the record herein, to wit:

I.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the first separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said first separate defense was pleaded as follows:

"FOR A FIRST FURTHER AND SEPARATE DEFENSE, defendant states that at all the times mentioned in said complaint it was operating and now operates a steam railroad for the transportation of freight and passengers between the City of San

Francisco and [226*—1†] the City of Los Angeles, which said railroad passed and passes through the points called by the complainant "intermediate." That the City of San Francisco is and at all the times mentioned in said complaint was situated on tide-water, and that defendant's freight terminal in the City of Los Angeles is and at all the times mentioned in said complaint was situated within a comparatively short distance from tide-water, and connected therewith by rail so that common carriers by water competed freely with defendant in the carriage of freight between San Francisco and the City of Los Angeles, of each and all of the properties and commodities described in paragraph IV of each of plaintiff's separately stated causes of action. That the effect of such competition by said water carriers is, and was at all the times in said complaint stated, to hold down through rates by rail between San Francisco and Los Angeles, on all of the property and commodities referred to in plaintiff's complaint, and to compel defendant to establish and maintain such through rates in competition with said water carriers and at less than a reasonable rate for the service performed. That the intermediate rates maintained by said defendant out of San Francisco toward Los Angeles by rail, and out of Los Angeles and toward San Francisco by rail, being the rates charged and collected as alleged in plaintiff's complaint, were and are reasonable rates for the service

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Assignment of Errors as same appears in Certified Transcript of Record.

performed, and that to reduce said intermediate rates so as to comply with Section 21 of Article XII of the Constitution of California, as the same existed from 1879 until October 10, 1911, or so as to comply with said Section 21 as amended October 10, 1911, would require defendant to establish such intermediate rates at less than a reasonable compensation for the services performed, and would deprive it of its property without due process of law, and would deprive it of the equal protection of the law, and would [227—2] compel defendant to devote its property to public use at less than a reasonable return on the fair value of its property so devoted.

II.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the second separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said second separate defense was pleaded as follows:

"FOR A SECOND FURTHER AND SEPARATE DEFENSE, defendant states that Section 21, Article XII, California Constitution, as the same existed from the year 1879 to October 10, 1911, is violative of the Constitution of the United States, in that, by attempting to fix rates withou a hearing it deprives railroad carriers of due process of law; that if defendant herein is compelled by final judgment herein to refund to plaintiff, on account of the shipments described in plaintiff's complaint as having moved or having been delivered prior to October

10, 1911, all or any of the sums claimed by plaintiff to be excessive charges thereon, the effect and operation of said Setcion 21, Article XII, California Constitution, will be to have arbitrarily established said forced and compelled rates as intermediate rates against defendant, without due process of law.

III.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the third separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said third separate defense was pleaded as follows:

"FOR A THIRD FURTHER AND SEPARATE DEFENSE, defendant states [228—3] that if said Section 21, Article XII, California Constitution, required the delivery of the goods mentioned in the complaint at the stations of delivery therein mentioned, at charges not exceeding the charges for the transportation of the same property in the same direction to said Los Angeles and San Francisco respectively, it is violative of the Constitution of the United States in that, if enforced as to any or all of plaintiff's separately stated causes of action, it would deprive the defendant of the equal protection of the law by denying it the right to meet the competition of carriers by water, which forces defendant's through rates between San Francisco and Los Angeles below a reasonable basis, as pleaded in defendant's first further and separate defense herein.

IV.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the fourth separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said fourth separate defense was pleaded as follows:

"FOR A FOURTH FURTHER AND SEPARATE DEFENSE, defendant states that as to the shipments specified in plaintiff's separately stated causes of action, that moved or were delivered prior to October 10, 1911, the rates collected for the transportation of each and all of them were rates established by the Railroad Commission of the State of California, pursuant to Section 22, Article XII, of the Constitution of the State of California, as it existed from 1879 to October 10, 1911; and said rates were at the time of their collection and are now conclusively just and reasonable. [229—4]

V.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the fifth separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said fifth separate defense was pleaded as follows:

"FOR A FIFTH FURTHER AND SEPARATE DEFENSE, defendant states that the through rates on defendant's line of railroad from San Francisco to Los Angeles, and from Los Angeles to San Fran-

cisco, on the same kinds and quantities of property as those alleged by plaintiff to have been transported by defendant as stated in plaintiff's complaint to points intermediate San Francisco and Los Angeles, were forced down and compelled by an actual competition with carriers by water between San Francisco and Los Angeles, and that therefore the property transported by defendant to the points intermediate San Francisco and Los Angeles, as alleged in said complaint, was not property of the same class as property of the same physical character and commercially called by the same name, on which lower through rates of transportation by rail between San Francisco and Los Angeles were offered by defendant.

VI.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the sixth separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said sixth separate defense was pleaded as follows:

"FOR A SIXTH FURTHER AND SEPARATE DEFENSE, defendant states that Section 71 of the Public Utilities Act of the State of California, approved December 23, 1911, and effective March 23, 1912, being Chapter 14 of the Statutes of California of the Special Session of 1911, provides as follows: **[230—5]**

"(a) When complaint has been made to the commission concerning any rate, fare, toll, ren-

tal or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection; *provided,* no discrimination will result from such reparation.

"(b) If the public utility does not comply with the order for the payment of reparation within the time specified in such order, suit may be instituted in any court of competent jurisdiction to recover the same. All complaints concerning excessive or discriminatory charges shall be filed with the Commission within two years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one year from the date of the order of the commission. The remedy in this section provided shall be cumulative and in addition to any other remedy or remedies in this act provided in case of failure of a public utility to obey an order or decision of the commission."

That neither plaintiff nor any of its assignors, nor any person for or on behalf of plaintiff or any of its assignors, has at any time applied to the Railroad Commission of the State of California for an order of reparation under the provisions of said section, respecting any one or more or all of the shipments

described in plaintiff's separately stated causes of action, and that therefore each of plaintiff's causes of action as separately stated is barred by the provisions of said Public Utilities Act, and this court has no jurisdiction to give judgment in plaintiff's favor for the whole or any part of all or any of plaintiff's causes of action.

VIII.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the eighth separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said eighth separate defense was pleaded as follows:

"FOR AN EIGHTH FURTHER AND SEPARATE DEFENSE, defendant [231—6] states that as to each and all of the shipments mentioned in plaintiff's complaint, which moved or were delivered after October 10, 1911, the rates charged and collected thereon by defendant were rates which, prior to October 10, 1911, had been established by the Railroad Commission of the State of California, and had not at the time of their collection as aforesaid been in any manner changed.

IX.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the ninth separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said ninth separate defense was pleaded as follows:

"FOR A NINTH FURTHER AND SEPARATE DEFENSE, defendant states that as to all of the shipments mentioned in plaintiff's complaint, which moved or were delivered prior to October 10th, 1911, the rate charged and collected for each of said shipments, as alleged in said complaint, was the rate published by said defendant and established by the Railroad Commission of the State of California, and as to said rates and each of them there is applicable Section 40 of an Act of the Legislature of the State of California, approved March 19, 1909, providing for the organization of the Railroad Commission of the State of California, and defining its powers and duties, which said section provides:

> "In all actions between private parties and transportation companies subject to the provisions of this act, in respect to any rate, charge, order, rule or regulation published as required by this act, the published rate, charge, order, rule or regulation shall be deemed to be just and reasonable, and shall not be open to controversy except in and by way of such proceedings for that purpose before the commission, and the courts as are provided for in this act."

That said Railroad Commission has never acted on or with respect to the rates collected by defendant for shipments described [232—7] in the complaint as having moved prior to October 10, 1911.

X.

The Court erred in sustaining and in not overrul-

ing plaintiff's demurrer to the tenth separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said tenth separate defense was pleaded as follows:

"FOR A TENTH FURTHER AND SEPARATE DEFENSE, defendant states that each and all of the payments made by plaintiff's assignors to the defendant, as specified and set forth in paragraph IV of each of plaintiff's separately stated causes of action, were made under the following circumstances:

The person, firm or corporation making such payment in each case paid the same without protest, and the amount paid by him to the defendant as alleged in said respective causes of action was collected by defendant in the belief that it was the lawful rate. The amount collected by said defendant in each of said cases was the amount specified by tariffs, which, as to the shipments that moved prior to October 10, 1911, had been established by the Railroad Commission of the State of California, and as to the shipments that moved after October 10, 1911, had been established by said Railroad Commission. The amount so paid was in such case no more than a reasonable compensation for the service performed by the defendant.

XI.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the eleventh separate defense set forth in defendant's answer and in holding

and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said eleventh separate defense was pleaded as follows: [233—8]

"FOR AN ELEVENTH FURTHER AND SEPARATE DEFENSE, defendant states that each of the rates charged and collected by defendant as alleged in plaintiff's separately stated causes of action was when and as charged and collected a just and reasonable rate for the service performed.

XII.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the twelfth separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts sufficient to constitute a defense or counterclaim.

Said twelfth separate defense was pleaded as follows:

"FOR A TWELFTH FURTHER AND SEPARATE DEFENSE, defendant states that the railroad over which the shipments referred to in the complaint were transported was at all times mentioned in the complaint a part of a railroad system operated by defendant, and was engaged in the carriage of freight and passengers in intrastate and interstate commerce. That for recovery of judgment herein plaintiff relies on Section 21 of Article XII of the Constitution of California, and particularly the provision thereof known as the long and short haul clause. That the effect of the application of said clause to California intrastate shipments on defendant's rail line between San Francisco and Los

Angeles would have been at all times mentioned in the complaint, and would be now, unduly to burden and interfere with the movement of freight passing over said line in intrastate commerce, by subjecting it to a higher freight rate than intrastate freight of the same class and character moving between Los Angeles and San Francisco under the same circumstances. Said result would be brought about by reason of the fact that the through rail rates for freight on defendant's line between San Francisco and **[234—9]** Los Angeles were, at all times mentioned in the complaint and are now, compelled to be lower than reasonable rail rates for said service and distance, by actual competition by carriers by water between San Francisco and Los Angeles, of the same commodities. Defendant's interstate rail rates for the same commodities to and from Arizona and New Mexico points on defendant's railroad system into and out of San Francisco and Los Angeles were and are not so compelled, but are reasonable rates for the service performed, and therefore to apply said long and short haul clause between San Francisco and Los Angeles would be to subject said interstate commerce to a greater burden than intrastate commerce of the same character between San Francisco and Los Angeles, which said burden would be undue and unjust.

XIII.

The Court erred in sustaining and in not overruling plaintiff's demurrer to the thirteenth separate defense set forth in defendant's answer and in holding and deciding that the same did not state facts

sufficient to constitute a defense or counterclaim.

Said thirteenth separate defense was pleaded as follows:

"FOR A THIRTEENTH FURTHER AND SEPARATE DEFENSE, defendant states that neither plaintiff nor any of its assignors suffered pecuniary loss or damage by or as a direct result of any of the matters, facts, or things pleaded in plaintiff's separately stated causes of action. **[235—10]**

XIII.

The Court erred in overruling defendant's motion for a nonsuit interposed by defendant at the close of the plaintiff's evidence for the reasons set forth in said written motion for a nonsuit which was and is as follows: **[236—11]**

*In the District Court of the United States, in and for the Northern District of California. ....*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Motion for Nonsuit.**

Now comes the defendant above named, and after the close of said plaintiff's case, and before submitting evidence on the denials and affirmative defenses raised by defendant's answer, moves the above-

entitled court for a judgment of nonsuit herein, on the following grounds:

First. That it does not appear from the evidence introduced by the plaintiff, taken in connection with the settled admissions made by the pleadings, that the charges collected by defendant and specified in paragraph 4 of each of the separately stated causes of action, and therein called excesisve charges, exceeded by any sum whatever the charge then made by defendant for the transportation in the same direction of the same amount and class of property, from the point of shipment described in said paragraph 4 to the more distant point from the point of delivery described in said paragraph 4 of each of said separately stated causes of action.

Second. That it does not appear from the evidence introduced on plaintiff's case, taken in connection with the admissions made **[237—12]** by defendant's pleadings, that defendant has never been in any case authorized by the Railroad Commission of the State of California to charge less for longer than for shorter distances for the transportation of property; and it does not appear from said evidence, taken in connection with said admissions, that the defendant was not, with respect to all and each of plaintiff's separately stated causes of action, authorized by the Railroad Commission of the State of California to charge less for the longer distance than for the shorter distance for which the respective charges paid by plaintiff's assignor herein were made.

Third. That it does not appear from the evidence introduced on behalf of plaintiff, taken in connection with the admissions made by defendant's pleadings, that said Railroad Commission of the State of California has never prescribed that defendant might in any case, or in any of the cases referred to in plaintiff's separately stated causes of action, be relieved from the prohibition of the Constitution of the State of California directed against charging less for the longer than for the shorter haul.

Fourth. That it affirmatively appears from plaintiff's evidence, taken in connection with the admissions made by defendant's pleadings, that plaintiff's assignors and each of them paid the amounts alleged to have been collected by defendant, voluntarily and without protest.

Fifth. That the plaintiff has failed to show that it, or any one or more of its assignors, suffered pecuniary loss or damage by or as a direct result of any of the matters, facts or things pleaded in plaintiff's separately stated causes of action.

Dated this 5th day of May, 1915.

(Signed.) GEORGE D. SQUIRES,
(Signed.) HENLEY C. BOOTH,
Attorneys for Defendant. [238—13]

XIV.

The Court erred in admitting in evidence Defendant's Exhibit "A" subject to the limitation that columns 10 and 14 of said exhibit, showing the various tariff rates only, should be considered in evidence and not for any other purpose, and in not admitting said exhibit in evidence for all purposes,

plaintiff having waived the objection that the same was not the best evidence and objecting solely on the ground that the same was irrelevant, and immaterial and plaintiff further admitting that the tariff numbers in column 14 of said exhibit are the tariffs which contained the lesser charges for the longer distance referred to in the complaint, that the charges collected by the defendant were made by defendant upon the basis stated in the tariffs in column 10 thereof and that the lesser rates for the longer distance, stated in various causes of action and in the complaint, are based on the tariffs mentioned in column 14 thereof.

Said exhibit "A" was and is in words and figures following, to wit: **[239—14]**

STATEMENT SHOWING IN DETAIL ITEMS EMBODIED IN COMPLAINT FILED BY THE CALIFORNIA ADJUSTMENT COMPANY AGAINST THE SOUTHERN PACIFIC COMPANY, U.S.DIST. COURT N.DIST. CALIFORNIA, CASE NO.15638 .

| Waybill Date 1. | No. 2. | From 3. | To 4. | Commodity 5. | Wt. 6. | Specific Rate Collected Per 100 lbs. 7 | Charges Collected 8. | Date Rate Effective If Tariff In Col. 10 Should Have Been Followed 9. | Charges Collected Were Based On Tariff No. 10. | Thru Basis S.P. to L.A. or L.A. to S.P. Rate 11. | Thru Basis S.P. to L.A. or L.A. to S.P. Charges 12. | Date Through Rate Effective If Through Tariff Should Have Been Followed 13. | Tariff Reference 14. | Difference Between Specific and Through Charges 15. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 9-22-11 | 25455 | San Francisco | Fresno | Castings & Fit. | 4460 | .44 | 19.62 | 6-11-09 | CRC 12 | .37½ | 16.72 | 3-22-11 | CRC 134 | 2.90 |
| 3-28-11 | 31233 | " | Bakersfield | Rope | 2073 | .72 | 14.93 | 6-11-09 | CRC 12 | .42½ | 8.82 | 3-22-11 | CRC 134 | 6.11 |
| 3-16-11 | 17303 | " | " | " | 2102 | .72 | 15.13 | 6-11-09 | CRC 12 | .42½ | 8.93 | 10-10-09 | CRC 134 | 6.20 |
| 1-24-11 | 23746 | " | " | " | 7042 | .72 | 50 70 | 6-11-09 | CRC 12 | .42½ | 29.96 | 10-10-09 | CRC 134 | 20.74 |
| 1-20-11 | 1244 | " Drumm St. | Fresno | Rice | 39400 | .36 | 141.84 | 6-11-09 | CRC 12 | .27½ | 108.35 | 10-10-09 | CRC 134 | 33.49 |
| 1-12-11 | 716 | " " | " | " | 40200 | .36 | 144.72 | 6-11-09 | CRC 12 | .27½ | 110.55 | 10-10-09 | CRC 134 | 34.17 |
| 2-18-11 | 493 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 10-10-09 | CRC 134 | 34.00 |
| 9-23-11 | 2828 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 8- 8-11 | 8987 | " | " | Pipe & Fitge. | 4060 | .44 | 17.86 | 6-11-09 | CRC 12 | .37½ | 15.22 | 3-22-11 | CRC 134 | 2.64 |
| 4-19-11 | 21402 | " | Porterville | Rode | 5428 | .61 | 33.11 | 6-11-09 | CRC 12 | .37½ | 20.36 | 3-22-11 | CRC 134 | 12.75 |
| 8-27-11 | 3027 | " | Fresno | Rice | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 8-14-11 | 1513 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 7- 8-11 | 743 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 6- 1-11 | 116 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 4-19-11 | 1526 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 3-14-11 | 902 | " " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 10-10-09 | CRC 134 | 34.00 |
| 1-18-11 | 17671 | " | Porterville | Raditors & Prts. | 2803 | .61 | 17.10 | 6-11-09 | CRC 12 | .37½ | 10.51 | 10-10-09 | CRC 134 | 6.59 |
| 9- 1-11 | 732 | " | Fresno | Pipe & Fitge. | 11382 | .44 | 50.08 | 6-11-09 | CRC 12 | .37½ | 42.68 | 3-22-11 | CRC 134 | 7.40 |
| 10- 4-11 | 640 | Leslie | Sanger | Salt | 30070 | .18½ | 55.63 | 6-11-09 | CRC 12 Sup 1 CRC 84 | .15 | 45.11 | 8-15-10 | CRC 84 | 10.52 |
| 3-31-11 | 261 | Crockett | " | Sugar | 40400 | .36½ | 148.47 | (X) | CRC 12 Sup 8 CRC 84 | .27½ | 111.10 | 3-22-11 | CRC 134 | 37.37 |
| 8-29-11 | 2028 | Paraffin | Fresno | Roofing | 46534 | .36 | 169.52 | 6-11-09 | CRC 12 | .27½ | 127.97 | 3-22-11 | CRC 134 | 39.55 |
| 6- 8-11 | 1245 | " | " | " | 30062 | .36 | 108.22 | 6-11-09 | CRC 12 | .27½ | 82.67 | 3-22-11 | CRC 134 | 25.55 |
| 4- 1-11 | 65 | Livny | Sanger | Sulphur | 35000 | .21½ | 63.75 | 6-11-09 | CRC 12 | .15 | 52.50 | 6-29-08 | CRC 84 | 11.25 |
| 9-18-11 | 14005 | Los Angeles | Fresno | Lumber | 8560 | .63 | 53.93 | 2-15-11 X | CRC 134 | .37½ | 32.11 | 3-22-11 | CRC 134 | 21.82 |
| 7-27-11 | 22943 | " | " | Honey Box Lbr. | 2010 | .63 | 12.66 | 2-15-11 X | CRC 134 | .42½ | 8.54 | 3-22-11 | CRC 134 | 4.12 |
| 1-30-11 | 22157 | " | " | Roofing | 37800 | .56 | 211.68 | 10-10-09 | CRC 134 | .27½ | 103.95 | 10-10-09 | CRC 134 | 107.73 |
| 4- 1-11 | 203 | " | " | Sweeping Comp. | 8880 | .74 | 65.72 | 2-15-11 X | CRC 134 | .48½ | 43.08 | 3-22-11 | CRC 134 | 22.64 |
| 8- 9-11 | 7965 | " | " | Gasoline Eng. | 5750 | .79 | 45.43 | 2-15-11 X | CRC 134 | .60 | 34.51 | 3-22-11 | CRC 134 | 10.92 |
| 8-18-11 | 15444 | " | " | Bugge.& Shafts | 4350 | 1.18½ | 51.55 | 2-15-11 X | CRC 134 | .90 | 39.15 | 3-22-11 | CRC 134 | 12.40 |
| 8-15-11 | 11920 | " | Tehachapi | Flour | 30144 | .30 | 90.43 | 8- 3-10 | CRC 805 | .22½ | 67.82 | 8- 3-10 | CRC 805 | 22.61 |
| 1-24-11 | 17426 | " | " | Soap | 2925 | .61 | 17.84 | 10-10-09 | CRC 134 | .37½ | 10.97 | 10-10-09 | CRC 134 | 6.87 |
| 6- 8-11 | 5732 | " | Fresno | Corrug.Iron | 2970 | .53 | 15.73 | 2-15-11 X | CRC 134 | .37½ | 11.13 | 3-22-11 | CRC 134 | 4.60 |
| 7-27-11 | 23037 | " | Tehachapi | Sugar | 3529 | .53 | 18.70 | 2-15-11 X | CRC 134 | .37½ | 13.23 | 3-22-11 | CRC 134 | 5.47 |
| 8-30-11 | 25638 | " | " | Soap | 3630 | .53 | 19.24 | 2-15-11 X | CRC 134 | .37½ | 13.61 | 3-22-11 | CRC 134 | 5.63 |
| 3- 1-11 | 776 | Giant | " | Explosives | 31097 | 1.08 | 335.85 | 6-11-09 | CRC 134 | .60 | 186.58 | 3-22-11 | CRC 134 | 149.27 |
| 2-21-11 | 232 | " | " | " | 575 | 2.16 | 12.42 | 6-11-09 | CRC 134 | 1.20 | 6.90 | 10-10-09 | CRC 134 | 5.52 |
| 6-12-11 | 14476 | San Francisco | Mojave | Beer | 26350 | .37½ | 98.81 | 4-20-09 | CRC 84 | .25 | 65.87 | 7-11-09 | CRC 84 | 32.94 |
| 8-16-11 | 19866 | " | " | " | 24000 | .37½ | 90.00 | 4-20-09 | CRC 84 | .25 | 60.00 | 7-11-09 | CRC 84 | 30.00 |
| 4-21-11 | 25018 | " | " | " | 25100 | .37½ | 94.13 | 4-20-09 | CRC 84 | .25 | 62.76 | 7-11-09 | CRC 84 | 31.37 |
| 7- 7-11 | 5641 | " | " | " | 27600 | .37½ | 103.50 | 4-20-09 | CRC 84 | .25 | 69.00 | 7-11-09 | CRC 84 | 34.50 |
| 5- 4-11 | 5165 | " | " | " | 25000 | .37½ | 93.75 | 4-20-09 | CRC 84 | .25 | 62.50 | 7-11-09 | CRC 84 | 31.25 |
| 7-18-11 | 20130 | " | " | " | 29400 | .37½ | 110.25 | 4-20-09 | CRC 84 | .25 | 73.50 | 7-11-09 | CRC 84 | 36.75 |
| 5-20-11 | 16814 | Los Angeles | Tehachapi | Sugar | 1512 | .53 | 8.01 | 2-15-11 X | CRC 134 | .27½ | 5.67 | 3-22-11 | CRC 134 | 2.34 |
| 6-30-11 | 25021 | " | Delano | Galvanized Ir. | 2475 | .55 | 13.61 | 2-15-11 X | CRC 134 | .37½ | 9.28 | 3-22-11 | CRC 134 | 4.33 |
| 3-21-11 | 17904 | " | Tehachapi | Tomatoes | 2800 | .53 | 14.84 | 2-15 11 X | CRC 134 | .37½ | 10.50 | 10-10-09 | CRC 134 | 4.34 |
| 6- 1-11 | 607 | " | Delano | Sheet Iron | 2985 | .55 | 16.42 | 2-15-11 X | CRC 134 | .37½ | 11.20 | 3-22-11 | CRC 134 | 5.22 |
| 3-11-11 | 9648 | " | Tehachapi | Carbide | 2140 | .58 | 12.41 | 2-15-11 X | CRC 134 | .42½ | 9.25 | 10-10-09 | CRC 134 | 3.16 |
| 3-27-11 | 23535 | " | " | Motor & Parts | 1845 | .58 | 10.70 | 2-15-11 X | CRC 134 | .42½ | 7.84 | 3-22-11 | CRC 134 | 2.86 |
| 9-30-11 | 25412 | " | Delano | Galvanized Ir. | 2284 | .55 | 12.56 | 2-15-11 X | CRC 134 | .37½ | 8.59 | 3-22-11 | CRC 134 | 3.97 |
| 8- 1-11 | 434 | " | " | " | 2012 | .55 | 11.07 | 2-15-11 X | CRC 134 | .37½ | 7.47 | 3-22-11 | CRC 134 | 3.60 |
| 9-25-11 | 20717 | " | Tehachapi | Wagon K.D. | 1590 | .58 | 9.32 | 2-15-11 X | CRC 134 | .42½ | 6.86 | 3-22-11 | CRC 134 | 2.46 |
| | | | | TOTAL | | | 3851.84 | | | | 2713.30 | | | 1137.94 |

(X) Rate based .06 to Lathrop Sup 1 CRC 84 3-22-10
X .30½ Lathrop to Sanger Sup 8 CRC 12 2-15-11
.36½

X Case 113

("CRC" means "California Railroad Commission")

15

| Waybill Date | No. | From | To | Commodity | Wt. | Specific Rate Collected Per 100 lbs. | Charges Collected | Date Rate Effective If Tariff In Col. 10 Should Have Been Followed | Charges Collected Were Based On Tariff No. | | Then Basis S.F. to L.A. or L.A. to S.F. Rate | Then Basis S.F. to L.A. or L.A. to S.F. Charges | Date Through Rate Effective If Through Rate Should Have Been Followed. | Tariff Reference | | Difference Between Charges Collected and Through Charges |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. | 2. | 3. | 4. | 5. | 6. | 7. | 8. | 9. | 10. | | 11. | 12. | 13. | 14. | | 15. |
| 3-13-11 | 8326 | San Francisco | Mojave | Wine in Glass | 855 | 1.10 | 9.41 | 6-11-09 | CRC | 134 | .60 | 5.14 | 10-10-09 | CRC | 134 | 4.27 |
| 3-11-11 | 12459 | " | Delano | Sheet Iron | 1805 | .62 | 11.19 | 6-11-09 | CRC | 12 | .37½ | 6.77 | 10-10-09 | CRC | 134 | 4.42 |
| 5- 1-11 | 88 | " | " | " " | 2644 | .62 | 16.39 | 6-11-09 | CRC | 12 | .37½ | 11.02 | 3-22-11 | CRC | 134 | 5.37 |
| 3-15-11 | 18041 | " | " | Pipe | 1700 | .62 | 10.54 | 6-11-09 | CRC | 12 | .37½ | 6.38 | 3-22-11 | CRC | 134 | 4.16 |
| 5-17-11 | 13218 | Los Angeles | San Luis Ob. | Tank Iron | 87800 | .27½ | 241.45 | 3-22-11 | CRC | 134 | .17½ | 153.65 | 1-25-11 | CRC | 84 | 87.80 |
| 5 4-11 | 2549 | " | " | " " | 97900 | .27½ | 269.23 | 3-22-11 | CRC | 134 | .17½ | 171.33 | 1-25-11 | CRC | 84 | 97.90 |
| 3-25-11 | 23280 | " | Bakersfield | Working Brls. | 6580 | .58 | 38.16 | 2-15-11 | XCRC | 134 | .42½ | 27.48 | 3-22-11 | CRC | 134 | 10.68 |
| 5- 8-11 | 5136 | " | San Luis Ob. | Tank Iron | 77400 | .27½ | 212.85 | 3-22-11 | CRC | 134 | .17½ | 135.45 | 1-25-11 | CRC | 134 | 77.40 |
| 2-13-11 | 9540 | " | Exeter | St.Riv.Pipe | 20000 | .56 | 112.00 | 10-10-09 | CRC | 134 | .27½ | 55.00 | 10-10-09 | CRC | 134 | 57.00 |
| 7-24-11 | 19525 | " | San Luis Ob. | Bar Iron | 36000 | .27½ | 99.00 | 3-22-11 | CRC | 134 | .15 | 54.00 | 3-22-10 | CRC | 84 | (X) 45.00 |
| 5-12-11 | 9149 | " | Bakersfield | Oil Well Sup. | 36380 | .40 | 145.52 | 2-15-11 | XCRC | 134 | .30 | 109.14 | 3-22-11 | CRC | 134 | 36.38 |
| 8-18-11 | 14662 | " | " | Boiler Shell | 8250 | .67 | 55.28 | 2-15-11 | XCRC | 134 | .60 | 49.51 | 3-22-11 | CRC | 134 | 5.77 |
| 8-29-11 | 1014 | Emery | Fresno | Bar Iron | 43062 | .36 | 155.03 | 6-11-09 | CRC | 12 | .15 | 64.60 | 3-22-10 | CRC | 84 | 90.43 |
| 8-26-11 | 1075 | " | " | " " | 38030 | .36 | 136.91 | 6-11-09 | CRC | 12 | .15 | 57.05 | 3-22-10 | CRC | 84 | 79.86 |
| 2- 1-11 | 59 | Los Angeles | Bakersfield | Oil Well Sup. | 41140 | .50 | 205.70 | 10-10-09 | CRC | 134 | .30 | 123.42 | 10-10-09 | CRC | 134 | 82.28 |
| 5-13-11 | 10308 | " | " | " " " | 32400 | .40 | 129.60 | 2-15-11 | XCRC | 134 | .30 | 97.20 | 2-15-11 | CRC | 134 | 32.40 |
| 4-22-11 | 18895 | " | " | Working Brls. | 3940 | .58 | 22.85 | 2-15-11 | XCRC | 134 | .42½ | 16.74 | 3-22-11 | CRC | 134 | 6.11 |
| 7-27-11 | 23543 | " | " | " " | 6720 | .58 | 38.98 | 2-15-11 | XCRC | 134 | .42½ | 28.57 | 3-22-11 | CRC | 134 | 10.41 |
| 8-10-11 | 5601 | " | " | " " | 4920 | .58 | 28.54 | 2-15-11 | XCRC | 134 | .42½ | 20.92 | 3-22-11 | CRC | 134 | 7.62 |
| 3-24-11 | 20486 | " | " | Sucker Rods | 10550 | .53 | 55.92 | 2-15-11 | XCRC | 134 | .37½ | 39.57 | 3-22-11 | CRC | 134 | 16.35 |
| 3-24-11 | 22188 | " | " | Pig Iron | 5535 | .58 | 32.10 | 2-15-11 | XCRC | 134 | .42½ | 23.52 | 3-22-11 | CRC | 134 | 8.58 |
| 7-25-11 | 28436 | San Francisco | " | Beer | 24700 | .37½ | 92.63 | 3-22-10 | CRC | 84 | .25 | 61.76 | 3-22-10 | CRC | 84 | 30.87 |
| 7-12-11 | 13169 | " | " | " | 24700 | .37½ | 92.63 | 3-22-10 | CRC | 84 | .25 | 61.76 | 3-22-10 | CRC | 84 | 30.87 |
| 6-12-11 | 14480 | " | " | " | 24600 | .37½ | 92.25 | 3-22-10 | CRC | 84 | .25 | 61.60 | 3-22-10 | CRC | 84 | 30.65 |
| 6- 3-11 | 3914 | " | " | " | 24700 | .37½ | 92.63 | 3-22-10 | CRC | 84 | .25 | 61.76 | 3-22-10 | CRC | 84 | 30.87 |
| 6- 7-11 | 8270 | " | " | " | 24500 | .37½ | 91.88 | 3-22-10 | CRC | 84 | .25 | 61.26 | 3-22-10 | CRC | 84 | 30.62 |
| 6-20-11 | 25253 | " | " | " | 25140 | .37½ | 94.28 | 3-22-10 | CRC | 84 | .25 | 62.66 | 3-22-10 | CRC | 84 | 31.62 |
| 5- 9-11 | 10763 | " | " | " | 24500 | .37½ | 91.88 | 3-22-10 | CRC | 84 | .25 | 61.26 | 3-22-10 | CRC | 84 | 30.62 |
| 4-29-11 | 35250 | " | " | " | 24700 | .37½ | 92.63 | 3-22-10 | CRC | 84 | .25 | 61.76 | 3-22-10 | CRC | 84 | 30.87 |
| 6-28-11 | 35827 | " | " | " | 24900 | .37½ | 93.37 | 3-22-10 | CRC | 84 | .25 | 62.24 | 3-22-10 | CRC | 84 | 31.13 |
| 6-24-11 | 31636 | " | " | " | 24800 | .37½ | 93.00 | 3-22-10 | CRC | 84 | .25 | 62.00 | 3-22-10 | CRC | 84 | 31.00 |
| 6-19-11 | 23737 | " | " | " | 24500 | .37½ | 91.88 | 3-22-10 | CRC | 84 | .25 | 61.26 | 3-22-10 | CRC | 84 | 30.62 |
| 2-16-12 | 10991 | Los Angeles | " | Sucker & Fitgs. | 10785 | .53 | 57.16 | 2-15-11 | XCRC | 134 | .37½ | 40.44 | 3-22-11 | CRC | 134 | 16.72 |
| 11-11-11 | 8182 | " | " | Oil Well Sup. | 37380 | .40 | 149.52 | 2-15-11 | XCRC | 134 | .30 | 112.14 | 3-22-11 | CRC | 134 | 37.38 |
| 11- 8-11 | 2666 | " | Exeter | Tank Iron | 13550 | .57 | 77.24 | 2-15-11 | XCRC | 134 | .37½ | 50.82 | 3-22-11 | CRC | 134 | 26.42 |
| 3- 9-12 | 2242 | San Francisco | Delano | Sheet Iron | 1830 | .62 | 11.35 | 6-11-09 | CRC | 12 | .37½ | 6.87 | 3-22-11 | CRC | 134 | 4.48 |
| 3- 3-12 | 10298 | " | " | Iron & Fitgs. | 2423 | .62 | 15.02 | 6-11-09 | CRC | 12 | .37½ | 9.09 | 3-22-11 | CRC | 134 | 5.93 |
| 4-15-12 | 20655 | " | " | Iron | 2080 | .62 | 12.90 | 6-11-09 | CRC | 12 | .37½ | 7.81 | 3-22-11 | CRC | 134 | 5.09 |
| 1-29-12 | 32912 | " | Mojave | Beer | 24000 | .37½ | 90.00 | 3-22-10 | CRC | 84 | .25 | 60.00 | 3-22-10 | CRC | 84 | 30.00 |
| 4-30-12 | 25000 | " | " | " | 25000 | .37½ | 93.75 | 3-22-10 | CRC | 84 | .25 | 62.50 | 3-22-10 | CRC | 84 | 31.25 |
| 12-23-11 | 31017 | " | " | Whiskey | 1000 | 1.03 | 10.30 | 6-11-09 | CRC | 134 | .48½ | 4.80 | 3-22-11 | CRC | 134 | 5.50 |
| 11- 4-11 | 3645 | " | " | Beer | 24350 | .37½ | 91.31 | 3-22-10 | CRC | 84 | .25 | 60.87 | 3-22-10 | CRC | 84 | 30.44 |
| 6- 4-12 | 3900 | " | " | " | 29720 | .37½ | 111.45 | 3-22-10 | CRC | 84 | .25 | 74.30 | 3-22-10 | CRC | 84 | 37.15 |
| 2-29-12 | 35003 | " | " | " | 24400 | .37½ | 91.50 | 3-22-10 | CRC | 84 | .25 | 61.00 | 3-22-10 | CRC | 84 | 30.50 |
| 12- 8-11 | 4353 | Los Angeles | Tehachapi | Refined Oil | 2852 | .58 | 16.54 | 2-15-11 | XCRC | 134 | .42½ | 12.12 | 3-22-11 | CRC | 134 | 4.42 |
| 12- 1-11 | 99 | " | Fresno | Paper | 40000 | .52 | 208.00 | 2-15-11 | XCRC | 134 | .27½ | 110.00 | 3-22-11 | CRC | 134 | 98.00 |
| 6-11-12 | 5300 | " | " | Roofing | 36770 | .43 | 158.11 | 5-29-12 | CRC | 1515 | .27½ | 101.12 | 5-27-12 | CRC | 1515 | 56.99 |
| 6- 3-12 | 228 | " | " | Bees Wax | 4150 | .79 | 32.79 | 2-15-11 | XCRC | 134 | .60 | 24.90 | 3-22-11 | CRC | 134 | 7.88 |
| 2-19-12 | 12841 | " | " | Boiler over 10 ft. 2 front | 3095 | .79 | 24.45 | 2-15-11 | XCRC | 134 | .60 | 18.57 | 3-22-11 | CRC | 134 | 5.88 |
| | | | | TOTAL | | | 4297 | | | | | 2753.14 | | | | 1543.96 |

(X) Complaint shows through rate 25¢ Difference $9.00

X Case 210

| Bayhill Date 1. | No. 2. | From 3. | To 4. | Commodity 5. | Wt. 6. | Specific Rate Collected Per 100 lbs 7. | Charges Collected 8. | Rate Effective If Tariff In Col. 10 Should Have Been Followed 9. | Tariff No. 10. | Thru Basis S.F. to L.A. or L.A. to S.F. Rate 11. | Thru Basis S.F. to L.A. or L.A. to S.F. Charges 12. | Rate Effective If Thru Basis Should Have Been Followed 13. | Tariff No. 14. | Difference Between Specific and Thru Basis Charges 15. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 8-10-11 | 104 | Paraffin | Fresno | Roofing | 31050 | .36 | 111.78 | 6-11-09 | CRC 12 | .27½ | 85.39 | 3-22-11 | CRC 134 | 26.39 |
| 4-25-11 | 26 | Lilvy | Sanger | Sulphur | 39680 | .21½ | 84.32 | 6-11-09 | CRC 12 | .15 | 59.52 | 11-28-10 | CRC 84 | 24.80 |
| 10-14-11 | 2718 | Paraffin | Fresno | Roofing | 38749 | .36 | 139.49 | 6-11-09 | CRC 12 | .27½ | 106.55 | 3-22-11 | CRC 134 | 32.94 |
| 11-10-11 | 3022 | " | " | " | 30427 | .36 | 109.54 | 6-11-09 | CRC 12 | .27½ | 83.68 | 3-22-11 | CRC 134 | 25.86 |
| 3-15-12 | 162 | " | " | " | 30102 | .36 | 108.37 | 6-11-09 | CRC 12 | .27½ | 82.78 | 3-22-11 | CRC 134 | 25.59 |
| 1-10-12 | 73 | " | " | " | 30012 | .36 | 108.04 | 6-11-09 | CRC 12 | .27½ | 82.53 | 3-22-11 | CRC 134 | 25.51 |
| 2-26-12 | 40 | Leslie | Sanger | Salt | 32465 | .18½ | 60.00 | 6-11-09 | CRC 12 | .15 | 48.64 | 11-28-10 | CRC 84 | 11.36 |
| 12- 8-11 | 2134 | San Francisco | Sanger | Fencing | 7605 | .49 | 37.26 | 6-11-09 | CRC 12 | .42½ | 32.32 | 3-22-11 | CRC 134 | 4.94 |
| 10-20-11 | 21814 | " | " | Beams | 8000 | .49 | 39.20 | 6-11-09 | CRC 12 | .42½ | 34.00 | 3-22-11 | CRC 134 | 5.20 |
| 12-21-11 | 2175 | " | Fresno | Rice | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 12- 9-11 | 712 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 11-10-11 | 1312 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 3- 4-12 | 423 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 1-19-12 | 1770 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 11- 4-11 | 4098 | " | " | Metal Lath | 11680 | .47 | 54.90 | 6-11-09 | CRC 12 | .42½ | 49.64 | 3-22-11 | CRC 134 | 5.26 |
| 3-22-12 | 28369 | " | " | St.Ful.& Bush. | 24000 | .33½ | 80.40 | 6-11-09 | CRC 12 | .30 | 72.00 | 3-22-11 | CRC 134 | 8.40 |
| 3- 6-12 | 515 | " | " | Rice | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| 9-29-11 | 5837 | " | " | " | 40000 | .36 | 144.00 | 6-11-09 | CRC 12 | .27½ | 110.00 | 3-22-11 | CRC 134 | 34.00 |
| | | TOTAL | | | | | 1941.30 | | | | 1507.05 | | | 434.25 |

## RECAPITULATION

| | | | | |
|---|---|---|---|---|
| Page 1 | 3851.24 | | 2713.30 | 1137.94 |
| " 2 | 4297.10 | | 2753.14 | 1543.96 |
| " 3 | 1941.30 | | 1507.05 | 434.25 |
| TOTAL | 10089.64 | | 6973.49 | 3116.15 |

XV.

The Court erred in the rejection of evidence offered by plaintiff upon the trial of said action in the following instances:

(1) The Court erred in sustaining plaintiff's objection to the introduction in evidence by defendant and in excluding from evidence, and in not admitting in evidence a certified copy of an order and decision of the Railroad Commission of the State of California, dated May 20, 1910, made and entered in case No. 110, entitled, "Associated Jobbers of Los Angeles, Complainant, vs. Southern Pacific Company, a Corporation, and Atchison, Topeka & Santa Fe Railway Company, a Corporation, Defendants, and Jobbers and Manufacturers' Association of Stockton, and Traffic Bureau of the Merchants' Exchange of San Francisco, Intervenors." Said order so excluded from evidence, was and is in words and figures following, to wit: [243—18]

BEFORE THE RAILROAD COMMISSION
of the
STATE OF CALIFORNIA.
Case No. 110.

ASSOCIATED JOBBERS OF LOS ANGELES,
Complainant,
vs.
SOUTHERN PACIFIC COMPANY, a Corporation, and ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation,
Defendants.

JOBBERS AND MANUFACTURERS' ASSOCIATION OF STOCKTON AND TRAFFIC BUREAU OF THE MERCHANTS' EXCHANGE OF SAN FRANCISCO,

Intervenors.

Submitted September 1, 1910. Decided December 20, 1910.

Messrs. KUSTER, LOEB & LOEB, for Complainant.

WM. F. HERRIN and C. W. DURBROW, for Defendant Southern Pacific Company.

E. W. CAMP and U. T. GLOTFELTER, for Defendant Atchison, Topeka and Santa Fe Railway Company.

C. L. NEUMILLER, for Jobbers and Manufacturers' Association of Stockton.

WM. R. WHEELER & SETH MANN, for Traffic Bureau of the Merchants' Exchange.

REPORT AND OPINION OF THE COMMISSION.

The complainant complains that the rate of freight governed by class rates, ranging from first class *of* Class E of current [244] tariffs, and upon the commodity of beer in carload lots from Los Angeles to the following points or stations in the San Joaquin Valley:

| | |
|---|---|
| Coalinga | Hanford |
| Goshen | Exeter |
| Tulare | Porterville |
| Oil City | Bakersfield |
| Olig | McKittrick |
| Fresno | Visalia |

and all intermediate points therewith, are both un-

reasonable and discriminatory.

The unreasonableness appears to be measured by rates applying from San Francisco to equidistant points with the points or stations complained of, as well as by comparison with rates applying for equal mileages between other points similarly situated.

The second count, discrimination, is based upon the defendants' rates from San Francisco; the complainant contending that her merchants are unable to meet San Francisco at or near the halfway point between the two cities by reason of discriminatory rates which give undue preference and advantage to San Francisco.

The Tariff Bureau of the Merchants' Exchange of San Francisco intervenes upon the second count, and contends that complainants are not discrimiated against, but, considering physical conditions, rates are in favor of complainant and to the prejudice of San Francisco.

The Jobbers and Manufacturers' Association of Stockton intervenes and asks consideration in any adjustment that may be made, but particularly differentials existing between San Francisco and Stockton and the points complained of, and that Stockton be given the full benefit of the lacal rates between San Francisco and Stockton and rates from Stockton to the points involved, which **[245]** are as follows:

In cents per 100 pounds:

| 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|
| .10 | .10 | .09 | .09 | .07 |

and other class rates, as shown by current tariffs. Short line distance from San Francisco to Stockton appears to be seventy-eight (78) miles, and in con-

sidering established class rates as above for a distance of seventy-eight (78) miles they can at least be considered unreasonably low as compared with other rates; for instance, from Stockton to a point seventy-eight 78) miles south, Los Banos, the rates are

In cents per 100 pounds:

| 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|---|---|---|---|---|---|---|---|---|---|
| .45 | .41 | .39 | .35 | .30 | .30 | .17 | .15½ | .12 | .11¾ |

and are certainly forced rates brought by keen water competition, as originally we find that the rates between San Francisco and Stockton were much higher.

The differentials that now exist and have existed for a number of years in the past between San Francisco, Stockton, and San Joaquin Valley points, are much lower than the forced rates, being as follows:

In cents per 100 pounds:

| 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|
| .05 | .07 | .07 | .07 | .04 |

and still less on other carload class rates. The record is not clear as to the reason for the existing low differential, except that it is to be gathered that they were made lower than the forced local rates in order to prevent water carriers operating between San Francisco and Stockton in participating in freight traffic between San Francisco and points in the San Joaquin Valley south [246] of Stockton in connection with rail carriers Stockton south. But it is apparent that such danger does not exist to-day, and while it is the custom for reasonable differentials to exist between commercial cities, it is fair to say that such low existing differentials would

not have existed were it not for the reason of the low forced water competitive class rates. Stockton merchants should have the full benefit of a forced rate condition between San Francisco and Stockton as well as San Francisco merchants, and the Stockton rates to the points complained of herein should be lower to the extent of the existing class rates between San Francisco and Stockton. Stockton merchants complain also that Sacramento merchants have an advantage in differentials to points in the San Joaquin Valley. We find that Sacramento, like Stockton, enjoys water competitive rates and the distance by water and water service between San Francisco and Sacramento and Stockton are on a fair parity; however, the adjustment outlined herein as between San Francisco and Stockton to points in controversy will raise the now existing discrimination between Sacramento and Stockton and the points complained of.

We now come to the contention of the merchants of Los Angeles. Class rates from San Francisco to Berenda, a point one hundred and sixty-eight (168) miles from San Francisco, are as follows:

In cents per 100 pounds:

| 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|---|---|---|---|---|---|---|---|---|---|
| .47 | .42 | .38 | .35 | .29¼ | .27½ | .19½ | .17½ | .15¼ | .13 |

Class rates from Los Angeles to Bakersfield, a point equal distant from Los Angeles (168 miles), are as follows:

In cents per 100 pounds:

| 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|---|---|---|---|---|---|---|---|---|---|
| .71 | .68 | .64 | .61 | .48 | .50 | .30¾ | .27½ | .22½ | .22½ |

The percentages in favor of the former range from 51 per cent first class to 73 per cent Class E, and while the rates from San Francisco to Berenda are much lower than the rates from Los Angeles to Bakersfield, the former may be considered to some extent forced rates, and taking into consideration all the conditions surrounding the compelling features of the former rates, we are of opinion that the present rates from Los Angeles to Bakersfield and other points north thereof in the San Joaquin Valley, mentioned herein, are excessive. This opinion is further corroborated by the fact that the defendants themselves so considered them in contemplating an adjustment of rates to and from the points in controversy, and were only prevented from making their rates effective upon that occasion by objection on the part of the San Francisco merchants.

The San Francisco intervenors made much of the increased cost of operation over the grades, particularly Tehachapi grade from Los Angeles to Bakersfield. In the question of the cost of operation, while a great mass of evidence was submitted, it was shown that the Tehachapi line was operated jointly by the Santa Fe and the Southern Pacific, thus reducing the cost to each line. Commissioner Lane of the Interstate Commerce Commission, in Case No. 2839, involving rates between Sacramento, Reno and Lovelock, expressed our views very aptly. He says: "We do not recognize the right of a carrier to single out a piece of expensive road and make the local traffic thereon bear an undue portion of the expense of its maintenance or of its construction. A road is

built and operated as a whole, and local rates are not to be made with respect to the difficulties of each particular portion, charging the cost of a bridge to the traffic of one section or the cost of a tunnel to traffic between its two mouths. * * * If the [248] position of the defendant were followed by the carriers generally it would result in rates that would vary from mile to mile as the cost of road per mile varies." And, consequently, we give no important consideration to either the cost of operating the terminals of San Francisco upon which so much stress was laid, including the bay and Dumbarton cutoff, or the grades between Los Angeles and Bakersfield, except that one in a measure offsets the other.

In reaching our conclusions we are cognizant of the fact that the Santa Fe line from Los Angeles to the San Joaquin Valley is of greater length than its competitor, but we have considered the request of the Santa Fe that it be considered upon the same mileage as the Southern Pacific. San Joaquin Valley is a very rich territory and is growing rapidly, and Los Angeles, San Francisco and Stockton must be considered not only as sources of supply for the Valley, but as markets for its products as well.

IT IS HEREBY ORDERED, that the defendants make effective, not later than February 15, 1911, tariffs in keeping with this opinion, fixing class rates from Los Angeles to Bakersfield, as follows:

| | In cents per 100 pounds: | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
| | .67 | .62 | .58 | .53 | .44 | .40 | .27 | .24 | .21 | .17 |
| And from Los Angeles to Visalia | .71 | .66 | .61 | .57 | .47 | .44 | .30 | .26 | .22 | .19 |
| And from Los Angeles to Fresno | .79 | .74 | .68 | .63 | .52 | .48 | .33 | .29 | .25 | .21 |

graduating the rates between the above points. Rates from Los Angeles, San Francisco, and Stockton to points on branch lines [249] will leave the main lines between Kern Junction, Bakersfield, and south of Fresno shall be fixed in the same manner, *i. e.*, if the rates from San Francisco to a branch line point is ten cents higher than to the main line junction point then the rate from Los Angeles and Stockton shall also be ten cents higher than the junction or main line point. From Stockton south the defendants reduce their rates so as to give Stockton the benefit of a differential under San Francisco equal to the existing class rates from San Francisco to Stockton upon all classes to all points involved. The commodity rate complained of was beer. Without giving definite figures the carriers will arrange their tariffs in such a manner as to eliminate the present discrimination, using as a basis the adjustment outlined for class rates.

(Signed) A. C. IRWIN,
Commissioner.

THEODORE SUMMERLAND,
Commissioner.

Attest: W. D. WAGNER,
Secretary. [250]

(2) The Court erred in sustaining plaintiff's objection to the notice to present list of deviations and justify exceptions made and entered by the Railroad Commission in Case No. 214, entitled "In the matter of the provisions of Section 21 of Article XII of the Constitution of California, relating to long and short hauls and through rates exceeding aggregate of intermediate rates," offered in evidence by defendant, dated October 26, 1911, upon the ground that the same was immaterial, irrelevant and incompetent and did not show that the Railroad Commission, after investigation, had granted relief, plaintiff expressly waiving the objection that the copy of the notice offered by the defendant was not certified. The Court also erred in excluding said document from evidence and in not admitting the same and in ruling that the same was incompetent, irrelevant and immaterial. Said document so excluded from evidence was and is in words and figures following, to wit: [251—25]

**Exhibit No. 4.**

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

No. 214.

In the Matter of the Provisions of Section 21 of Article XII of the Constitution of California, Relating to Long and Short Hauls and Through Rates Exceeding Aggregate of Intermediate Rates.

NOTICE TO PRESENT LIST OF DEVIATIONS AND TO JUSTIFY EXCEPTIONS.

To All Railroad and Other Transportation Companies Within the State of California:

You and each of you are hereby notified that at a regular meeting of the Railroad Commission of the State of California, held at the office of the commission in the City of San Francisco, State of California, on the 16th day of October, 1911, all the commissioners being present and voting, the following resolution was unanimously adopted:

"Whereas Section 21 of Article XII of the Constitution of California, as amended on October 10, 1911, provides in part as follows:

> 'It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. *Provided,* however, that upon application to the railroad commission, provided for in this constitution, such company may, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances for the transportation of persons or property, and the railroad commission may from time to time prescribe the extent to which such company may be relieved from

the prohibition to charge less for the longer than for the shorter haul': and, [252—26]

Whereas, most of the railroad and other transportation companies of this State have filed with this commission certain schedules which are not in conformity with said provisions of the constitution of this State, unless authorized by this commission.

"NOW, THEREFORE, BE IT ORDERED, that each railroad and other transportation company which has filed with this commission any schedule containing any rate or fare showing a greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or a greater compensation as a through rate than the aggregate of the intermediate rates, file with this commission on or before the 2d day of January, 1912, a complete list of each rate or charge not in conformity with said provisions of the constitution of this State, unless authorized by this commission, as shown by its schedules of rates and fares on file with this commission, showing in each case the name of the commodity or description of the traffic, or the passenger or other service, the point or points of origin and destination, the highest intermediate rate or fare with the name of the point (in case of long and short haul) or the different intermediate rates (in case of a greater compensation for a through route), and the rate or fare to the more distant point.

"BE IT FURTHER ORDERED, that each of said railroad and other transportation companies present to this commission on or before said 2d day of January, 1912, for examination and investigation by this commission, a new schedule or schedules removing said deviations from the provisions of said section of the constitution of this State, or in case it is desired to justify the same, or any of them, an application or applications to be relieved from the provisions of said section, said application or applications to be in such of the two following forms as may meet the conditions as to which relief [253—27] is sought:

(a) The ——— (name of carrier)———, through ——— (name of officer or agent making application) ———, its ——— (official title of officer or agent) ———, petitions the Railroad Commission of the State of California for authority to establish rates (or fares) for the transportation of ——— (name of commodity or description of traffic, or passengers) ——— from ——— (name of point or points of origin) ——— to ——— (name of point or points of destination) ——— lower than the rates (or fares) concurrently in effect to intermediate points ——— (names of all intermediate points) ———; the highest charge at such intermediate points to apply at ——— (name of intermediate point) ———, and to be not more than ——— (cents per 100 pounds, per ton, per car, or per package, or per passenger) ——— in excess of the rates to ——— (name of more distant point to which lower rate is proposed) ———. This application is based upon the desire of

petitioner to meet (by direct haul over a longer line or route, or by water competition), competitive conditions created at ——— (name of more distant point or points at which the lower rates or fares are proposed) ——— by ——— (name of railway, or of regular line of steamers or so-called "tramp vessels").

(b) Application shall be made in general form the same as (a), but shall request authority to charge a higher rate or fare as the through rate or fare than the aggregate of the intermediate rates or fares. The application shall state clearly the [254—28] reasons in support thereof, and shall specify the extent to which it is desired to make the through rate or fare higher than the aggregate of the intermediate rates or fares.

Separate applications should be made for different situations governed by different rate adjustments or competitive influences. Where the rates or fares are contained in a joint tariff schedule, a petition from the carrier which issued the schedule or from the duly authorized agent, specifying the same by C. R. C. number, may be made on behalf of the carriers lawfully parties to the schedule, and will be held and considered to be on behalf of all carriers concurring in the schedule. Each carrier may file as many applications as are necessary to present properly the several situations as to which it desires relief, and it is desirable that each particular situation be treated by itself. Each application must be certified by the officer or agent making the same.

"AND BE IT FURTHER ORDERED that the Secretary be and he is hereby ordered to serve a copy of that order on each of said railroad and other transportation companies and to notify each of them to comply with all the requirements hereof."

And you are further notified to comply with each and all requirements of said resolution within the time or times in said resolution specified.

By order of the Commission.

[Seal] (Signed.) CHARLES R. DETRICK,
Secretary.

Dated San Francisco, California, October 26, 1911.
[255—29]

(3) The Court erred in sustaining plaintiff's objection to the order of the Railroad Commission of the State of California, offered by defendant, dated November 20, 1911, granting permission to the carriers to continue the present rate bases and adjusting rates pending hearing on applications for relief from the provisions of Section 21 of Article XII of the Constitution of the State of California, made and entered in case No. 214 entitled, "In the matter of the provisions of Section 21 of Article XII of the Constitution of California, relating to long and short hauls and through rates exceeding aggregate of intermediate rates," said objection being made upon the ground that said order was immaterial, irrelevant and incompetent, and did not show that the Railroad Commission, after investigation, had granted relief from the provisions of Section 21 of Article XII of the Constitution of the State of California as amended October 10, 1911, plaintiff expressly waiv-

ing objection to said offer on the ground that it was not certified. The Court also erred in excluding said document from evidence and in not admitting same in evidence, and in ruling that the same was incompetent, irrelevant and immaterial. Said document so excluded from evidence was and is in words and figures following, to wit: [256—30]

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

No. 214.

In the Matter of the Provisions of Section 21 of Article XII of the Constitution of California, Relating to Long and Short Hauls and Through Rates Exceeding Aggregate of Intermediate Rates..

PERMISSION TO CARRIERS TO CONTINUE PRESENT RATE BASES AND ADJUSTMENT OF RATES PENDING HEARING ON APPLICATIONS FOR RELIEF FROM PROVISIONS OF SECTION 21 ARTICLE 12 OF CONSTITUTION OF CALIFORNIA.

To All Railroads and Other Transportation Companies Within the State of California.

Permission is hereby granted to railroads and other transportation companies until January 2d, 1912, to file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under

the present rate bases or adjustments, higher rates or fares at intermediate points; provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10th, 1911, except when a longer line or route desires to reduce rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line.

The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points [257—31] all of which rates and fares will be investigated at the hearing to be held January 2d, 1912.

By order of the Commission.

CHARLES R. DETRICK,
Secretary.

Dated San Francisco, California, November 20th, 1911.

[Seal] A true copy.

H. G. MATHEWSON,
Assistant Secretary Railroad Commission State of California. [258—32]

(4) The Court erred in sustaining the plaintiff's objection to the introduction in evidence of certified copies of Southern Pacific Company's petitions Nos. 3, 9, 10, 30, and 40 addressed to the Railroad Commission of the State of California praying for relief from the provisions of Section 21 of Article XII of the Constitution of the State of

California as amended October 10, 1911, with respect to the rates specified in those petitions which said petitions were filed December 30, 1911, pursuant to the order made by the Railroad Commission on November 20th, and notice dated October 26th, 1911, excluded from evidence by the Court, said objection being made upon the ground that said petitions and each of them were irrelevant, immaterial and incompetent. The Court also erred in excluding said petitions and each of them from evidence and in not admitting same and each of them in evidence and in ruling that said petitions and each of them were incompetent, irrelevant and immaterial. Said petitions so excluded from evidence were and are in words and figures following, to wit: [259—33]

Form B

Petition No. 3 C. R. C. No. . .

SOUTHERN PACIFIC COMPANY

(Pacific System)

FREIGHT TRAFFIC DEPARTMENT

To the RAILROAD COMMISSION OF CALIFORNIA,

San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF LOCAL RATES OF JAN. 1, 1894, C. R. C. NO. 134 WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC , COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Column No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a general way the adjustment of rates covered by tariff C. R. C. No. 134, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further de-

tails and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul, lower rates fixed at the more distant point by competition with water carriers, viz., by the California Transportation Company et al. and "tramp" vessels.

Respectfully submitted,
SOUTHERN PACIFIC COMPANY,
By H. A. JONES,
Its Freight Traffic Manager,
H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Feb. 25, 1914. [260—34]

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. | From | To | Description of Intermediate Points. | High Rate Intermediate Point. | Excess of Rate Per 100 Lbs. | More Distant Point at Which Lower Rate is Proposed. |
| Class Rates (1st Class) | San Francisco | Stockton | Rodeo<br>Bethany<br>and points between | Herdlyn | 7 | Stockton |
| | | | Alston<br>Ellis<br>and points between | Cayley | 8 | Stockton |

This will also cover rates to and from points beyond and to and from intermediate points which are influenced by rates shown above.

[35]

Form B

Petition No. 9 C. R. C. No. ....

SOUTHERN PACIFIC COMPANY
(Pacific System)

FREIGHT TRAFFIC DEPARTMENT

To the RAILROAD COMMISSION OF CALIFORNIA,
San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF, LOCAL FREIGHT TARIFF # 37 C. R. C. No. 12, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Column No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a general way the adjustment of rates covered by tariff C. R. C. No. 12, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further details and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul, lower rates fixed at the more distant point by competition with water carriers, viz., by the over a longer line or route competitive conditions created at Tulare by A. T. &. S. F. Ry. and "tramp" vessels.

Respectfully submitted,

SOUTHERN PACIFIC COMPANY,

By H. A. JONES,

Its Freight Traffic Manager,

By H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Feb. 25, 1914. [261--36]

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. Class Rates (1st Class) [37] | From Visalia | To Tulare | Description of Intermediate Points. Goshen Jct. Tagus | High Rate Intermediate Point. Tagus | Excess of Rate Per 100 Lbs. 9 | More Distant Point at Which Lower Rate is Proposed. Tulare |

Form B

Petition No. 10. C. R. C. No.....

SOUTHERN PACIFIC COMPANY.

(Pacific System)

FREIGHT TRAFFIC DEPARTMENT.

To the RAILROAD COMMISSION OF CALIFORNIA,

San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF LOCAL FREIGHT TARIFF #37, C. R. C. No. 12, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Column No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a gen-

eral way the adjustment of rates covered by tariff C. R. C. No. 12, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and, it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further details and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul, lower rates fixed at the more distant point by competition with water carriers, viz., by the California Transportation Company and "tramp" vessels.

Respectfully submitted,
SOUTHERN PACIFIC COMPANY,
By H. A. JONES,
Its Freight Traffic Manager.
By H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Feb. 25, 1914. [262—38]

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. | From | To | Description of Intermediate Points. | High Rate Intermediate Point. | Excess of Rate Per 100 Lbs. | More Distant Point at Which Lower Rate is Proposed. |
| Class Rates 1st Class | San Francisco | Tracy | Rodeo<br>Bethany<br>and points between | Herdlyn | 7 | Tracy |
| Do. | | | Alston<br>Ellis<br>and points between | Cayley | 8 | Tracy |

This will also cover rates to and from points beyond and to and from intermediate points which are influenced by rates shown above.

[39]

Form B

Petition No. 30. C. R. C. No. ....

SOUTHERN PACIFIC COMPANY.

(Pacific System)

FREIGHT TRAFFIC DEPARTMENT.

To the RAILROAD COMMISSION OF CALIFORNIA,

San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF S. P. CO'S NO. 659, C. R. C. NO. 805, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Column No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a gen-

eral way the adjustment of rates covered by tariff C. R. C. No. 805, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and, it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further details and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul, lower rates fixed at the more distant point by competition with water carriers, viz., by the Pacific Coast Steamship Co., also rail to parts, thence via Pacific Coast Steamship Company and "tramp" vessels.

Respectfully submitted,
SOUTHERN PACIFIC COMPANY,
By H. A. JONES,
Its Freight Traffic Manager.
H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Feb. 25, 1914. **[263—40]**

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. | From | To | Description of Intermediate Points. | High Rate Intermediate Point. | Excess of Rate Per 100 Lbs. | More Distant Point at Which Lower Rate is Proposed. |
| Flour, Cereal and cereal products Carloads. | San Francisco | Los Angeles | Octol<br>Burr<br>Tropico and points between | Sylmar | 7½ | Los Angeles |
| Do. | Do. | Do. | Cuesta<br>Tropico and points between | Sylmar<br>Canoga<br>Burbank | 7½<br>6¾<br>4¼ | Los Angeles |
| Do. | Chico | Do. | Lingard<br>Gadwall<br>Tropico and points between | Acton | 15¼ | Do. |
| Do. | Sacramento | Santa Barbara | Edison<br>Saugus and points between | Honby | 5 | Santa Barbara |

This will also cover rates to and from points beyond and to and from intermediate points which are influenced by rates shown above.

[41]

Petition No. 40. Form A. C. R. C. No.....

SOUTHERN PACIFIC COMPANY.
(Pacific System)

FREIGHT TRAFFIC DEPARTMENT.

To the RAILROAD COMMISSION OF CALIFORNIA,
San Francisco, California.

APPLICATION FOR RELIEF FROM PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA AS AMENDED OCTOBER 10, 1911, FOR ACCOUNT OF TARIFF S. P. CO. COMM. SPECIALS #16-Y, C. R. C. NO. 84, WHICH IS ON FILE WITH YOUR HONORABLE COMMISSION:

The SOUTHERN PACIFIC COMPANY, through H. A. JONES, its Freight Traffic Manager, petitions the Railroad Commission of California for authority to continue for itself and participating carriers, which may be named in above-mentioned tariff, rates for the transportation of property as described in Column No. 1, page 2, from points specified in Column No. 2, and to points specified in Column No. 3, lower rates than concurrently in effect from or to intermediate points as described in Column No. 4; the highest charge at such intermediate points to apply at point shown in Column No. 5, and to be not more than cents per 100 lbs., shown in Column No. 6 in excess of the rates to points shown in Column No. 7.

The following tabulation, page 2, outlines in a general way the adjustment of rates covered by tariff

C. R. C. No. 84, and is in the nature of an explanation of the general features where the rates do not conform to Section 21 of Article XII of the Constitution of California as amended October 10, 1911. There are, however, instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance, but it is not practicable to state them all in detail in this petition, and, it is the desire of your petitioner to continue such rates in force as in said tariff provided, reference hereby being made to said tariff for further details and particulars as to said rates.

This application is based upon the desire of petitioner to meet by direct haul over a longer line or route competitive conditions created at.....by Pacific Coast Steamship Company and various other water-faring craft.

Respectfully submitted,
SOUTHERN PACIFIC COMPANY,
By H. A. JONES,
Its Freight Traffic Manager.
H. G. TOLL.

Subscribed and sworn to before me this 30th day of December, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires Feb. 25, 1914. [264—42]

| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 |
|---|---|---|---|---|---|---|
| Description of Traffic. | From | To | Description of Intermediate Points. | High Rate Intermediate Point. | Excess of Rate Per 100 Lbs. | More Distant Point at Which Lower Rate is Proposed. |
| Canned Goods Carloads | San Francisco | Los Angeles | Gadwall Lingard Tropico and points between | Lancaster | 44 | Los Angeles |
| Do. | Do. | Do. | Spence Tropico and points between | Paso Robles | 16 | Los Angeels |

This will also cover rates to and from points beyond and to and from intermediate points which are influenced by rates shown above.

[43]

(5) The Court erred in sustaining plaintiff's objection to the copy of the minutes of the California Railroad Commission of January 2, 1912, offered in evidence by defendant, the same being a correct copy of said minutes with the exception of the reporter's transcript therein referred to which was covered by the trial stipulation filed in this cause, plaintiff expressly waiving all objections to said offer on the ground that the same was not certified, plaintiff's objection being based upon the ground that said document was incompetent, irrelevant and immaterial. The Court also erred in excluding said document from evidence and in not admitting same in evidence and in ruling that the same was incompetent, immaterial and irrelevant. Said document so excluded from evidence was and is in words and figures following: **[265—44]**

In the matter of Case No. 214 entitled "In the matter of the provisions of Section 21 of Article 12 of the Constitution of California relating to long and short hauls and through rates exceeding aggregate of intermediate rates," set for hearing at this time and place, the Commission proceeded to a hearing of the same. The following appearances were entered:

G. J. Bradley of the Merchants and Manufacturers' Association of Sacramento.

W. E. Wheeler and Seth Mann of the Traffic Bureau of the Merchants' Exchange.

F. R. Hill of the Fresno Traffic Association.

F. P. Gregson of the Associated Jobbers of Los Angeles.

G. W. Luce and C. W. Durbrow of the Southern Pacific Company.

Edward Chambers and H. P. Anewalt of the Atchison Topeka & Santa Fe Railway.

E. S. Pillsbury of Wells, Fargo & Company Express.

Archibald Gray and C. H. Helting of the Western Pacific Railway.

William Henshaw of the Southern California Cement Company.

Discussion was held until 11:05 A. M.

(See Reporter's Transcript.)

It is hereby certified that the foregoing is a true copy of minutes of the meeting of the Railroad Commission of the State of California held on the 2d day of January, 1912, insofar as said minutes relate to case No. 214. [266—45]

(6) The Court erred in sustaining the plaintiff's objection to the introduction in evidence of an order of the Railroad Commission of the State of California, dated January 16, 1912, made and entered in case No. 214 entitled "In the matter of the provisions of Section 21 of Article XII of the Constitution of the State of California relating to long and short hauls and through rates exceeding aggregate intermediate rates," which said order extended until February 15, 1912, the time for filing applications for relief from provisions of Section 21 of Article XII of the Constitution of the State of California, said objection being made upon the ground that said offer was irrelevant, incompetent and immaterial, plaintiff expressly waiving objection thereto upon

the ground that same was not certified. The Court also erred in excluding said document from evidence and in not admitting same in evidence and in ruling that the same were incompetent, irrelevant and immaterial. Said document so excluded from evidence was and is in words and figures following, to wit: [267—46]

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

No. 214.

IN THE MATTER OF THE PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION OF CALIFORNIA RELATING TO LONG AND SHORT HAULS AND THROUGH RATES EXCEEDING AGGREGATE OF INTERMEDIATE RATES.

It is hereby ordered that the time heretofore granted to the railroad and other transportation companies of the State within which to file with this Commission new schedules removing deviations from the provisions of Section 21 of Article XII of the Constitution of this State, or in case it is decided to justify the same, or any of them, applications to be relieved from the provisions of said section, be and the same is hereby extended to February 15, 1912, at which time said schedules or applications must be filed with this Commissioner. As to any rate or fare as to which neither such schedule nor such application has been filed with this Commission by said date, the provisions of said Section 21, of Article

XII, of the Constitution will at once become operative, and the lower rate or fare for a longer distance will become the maximum rate or fare for all intermediate points on the same line or route for movements in the same direction, the shorter haul being included within the longer distance, and the aggregate of the intermediate rates or fares will become the through rate or fare in cases in which the through rate or fare is now in excess of the aggregate of the intermediate rates or fares.

Until February 15, 1912, the railroad and other transportation companies may file for establishment with the Commisssion in the manner prescribed by law and in accordance with the Commission's regulations such changes in rates and fares as would occur in the [268—47] ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points: Provided that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911, except when a longer line or route desires to reduce rates or fares to the most distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line. The Commission does not hereby indicate that it will finally apprpove any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.

And be it further ordered that the Secretary be and he is hereby ordered to serve a copy of this or-

der on each of said railroad and other transportation companies and to notify each of them to comply with all requirements hereof.

Dated: January 16, 1912. [269—48]

(7) The Court erred in sustaining plaintiff's objection to the certified copy of the decision of the Railroad Commission of the State of California, dated March 28, 1912, made and entered in case No. 116 entitled, "Traffic Bureau of the Merchants Exchange, complainants, vs. Southern Pacific Company, a corporation, and Atchison, Topeka and Santa Fe Railway Company, a corporation, defendants, Associated Jobbers of Los Angeles, Stockton Jobbers and Manufacturers' Association, Kern County Merchants Association and Fresno Traffic Association, Intervenors," offered in evidence by defendant said objection being made upon the ground that said offer was immaterial, irrelevant, and incompetent and not made by the Commission in pursuance of said Section 21 of Article XII of the Constitution of the State of California and was not made by the Commission upon the application made by the carriers for relief from the provisions of said section and that said order did not become effective until after the movement of the shipments described in the complaint. The Court also erred in excluding said document from evidence and in not admitting same in evidence and in ruling that same was incompetent, immaterial, and irrelevant and was not made by the Commission in pursuance of said Section 21 of Article XII of the Constitution and was not made by the Commission upon the application of the carriers

for relief from the provisions of said Section and in holding that said order was inadmissible because it was not effective until after the movement of the shipments described in the complaint. Said document so excluded from evidence was and is in words and figures following, to wit: [270—49]

**Exhibit No. 7.**

COPY.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

No. 116.

TRAFFIC BUREAU OF THE MERCHANTS EXCHANGE,

Complainants,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation), and ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a Corporation),

Defendants,

ASSOCIATED JOBBERS OF LOS ANGELES, STOCKTON JOBBERS AND MANUFACTURERS ASSOCIATION, KERN COUNTY MERCHANTS ASSOCIATION, FRESNO TRAFFIC ASSOCIATION,

Intervenors.

**Decision.**

On December 24, 1910, the Railroad Commission decided Case No. 110, wherein an adjustment of the class rates between San Francisco, Stockton, and

Los Angeles and San Joaquin Valley points was made, and made the effective date of the order February 15, 1911. Before this date, the Traffic Bureau of the Merchants Exchange of San Francisco applied to the Commission for a rehearing, which application was contested by the Associated Jobbers of Los Angeles. Thereafter and before the effective date of such order, the Commission denied the application for a rehearing. On March 2, 1911, the Traffic Bureau of the Merchants Exchange of San Francisco filed a complaint against the Southern Pacific Company and the Atchison, Topeka and Santa Fe Railway Company in which complaint that portion of the order in Case No. 110, which provided that Stockton should have "the benefit of a differential under San Francisco equal to the existing class rates from San Francisco to Stockton upon all classes to all points involved" was attacked, and the complainant urged that it was **[271—50]** not concerned with these arbitrary additions to said rates as they existed at the time of filing this complaint and provided that the same are left to adjustment brought about by untrammelled water competition and are not in any other manner whatsoever fixed or determined." On this theory of the proper method to make rates from San Francisco into the San Joaquin Valley, the complaint attacks all class rates from the City of Stockton to all points in the San Joaquin Valley and "charges that said rates applying from Stockton to the points named are, and each of them is, excessive, unreasonable, unjust and unlawful." Regardless of its contention, however,

that the rates from San Francisco shall be left "to adjustment brought about by untrammelled water competition and are not in any other manner whatsoever fixed or determined," the complaint prays that this Commission "determine and prescribe what will be the just and reasonable rates and charges to be hereafter observed and charged for the transportation of merchandise from said Cities of San Francisco and Stockton, respectively, to points in the San Joaquin Valley." Thereafter the Southern Pacific and the Atchison, Topeka & Santa Fe Railway Company filed answers denying the material allegations of the complaint. The Associated Jobbers of Los Angeles were permitted by the Commission to intervene on the question of the reasonableness of the class rates from Los Angeles to all points in the San Joaquin Valley and from all points within the San Joaquin Valley to Los Angeles, and the Stockton Jobbers and Manufacturers Association, the Kern County Merchants Association and the Fresno Traffic Association were also permitted to intervene on the sole question of the reasonableness of the rates attacked in the complaint and by the Los Angeles intervenors. The case was tried by all parties in the theory that only main line points are involved.

We have therefore directly in issue all the rates on the main lines of these two carriers between Stockton and all points in the [272—51] San Joaquin Valley and between all points within the San Joaquin Valley and all other points within the San Joaquin Valley and from Los Angeles to all points in the San Joaquin Valley and from all points

within the San Joaquin Valley to Los Angeles, and after careful consideration of all the evidence presented in the case, the Commission is of the opinion and finds, as a fact, that the rates in question insofar as they exceed the rates set out in the schedules hereto attached and made a part hereof, are excessive, unjust and unreasonable, and the Commission sets out herein schedules of rates to be observed by these carriers, respectively, for the transportation of freight at class rates between the points named therein, and finds the rates set out in such schedules to be just and reasonable rates.

In order that there may be no misapprehension on the part of the carriers involved as to the scope of this decision, we have, as already indicated, prescribed the actual rates to be charged between all points involved, and as to such rates there can be no confusion. As to rates from and to points other than those involved in this decision in making such adjustments as may be made necessary by this decision, the carriers will, of course, bear in mind, the provisions of Article XII, Section 21 of the Constitution of this State preventing the charging of a greater compensation in the aggregate for the transportation of a like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer, and also that portion of the same section preventing the charging of any greater compensation as a through rate than the aggregate of the intermediate rates, and likewise Article XII, Section 20 of the Constitution pre-

venting the increase of any rates without the permission of the Railroad Commission.

Two schedules of class rates are attached hereto and made a part hereof. Schedule No. 1 is hereby established as just and reasonable [273—52] rates to be observed by the Southern Pacific Company, and Schedule No. 2 is hereby established as just and reasonable rates to be observed by the Atchison, Topeka & Santa Fe Railway Company, both of such schedules to become effective on the 27th day of April, 1912, and before such time the carriers are instructed to present to this Commission, and to distribute as required by law, printed copies of such tariffs.

Dated March 28, 1912.

San Francisco, California.

JOHN M. ESHLEMAN,
H. D. LOVELAND,
ALEX. GORDON,
Commissioners.

A true copy.

[Seal] (Signed.) H. G. MATHEWSON,
Assistant Secretary Railroad Commission, State of California.

(The schedule of rates herein referred to are on file in the office of the Railroad Commission of the State of California.)

It is hereby certified that the foregoing contains a full, true, and correct copy of the decision and order of the Railroad Commission of the State of California in Case 116, Decision No. 56, decided March 28, 1912, and reported in Volume 1 of the

published Opinions and Orders of said Commission at page 95 and following, with the exception of the schedules of rates referred to in said order.

It is further certified that in said schedule of rates there appeared a 5th class rate of 43 cents per 100 pounds applicable on roofing paper in carload lots from Los Angeles to Fresno, and that said last mentioned rate was in effect June 11, 1912, and said last mentioned rate appears in Southern Pacific Company's freight tariff No. 711, California Railroad Commission No. 1515, which said last mentioned tariff was filed with this Commission and became effective according to its terms on May 27, 1912, and is now on file with this Commission.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Commission on this 3 day of April, 1915.

(Signed.) CHARLES R. DETRICK, (Seal) Secretary, Railroad Commission of the State of California. [274—53]

(8) The Court erred in sustaining and in not overruling the objection of plaintiff to the following question propounded to the witness Gomph made upon the ground that the same was immaterial, irrelevant and incompetent.

"Mr. BOOTH.—This witness' testimony, if your Honor please, and documentary evidence I intend to offer, are addressed to the question of whether the Railroad Commission established the local rates or intermediate rates shown on "Exhibit A" prior to October 10, 1911, the rates so established being in conflict with the long and short haul clause in the

Constitution as it stood up to October 10, 1911. I want to renew my question to Mr. Gomph by asking him if this letter which I show him, a certified copy of a letter which I show him is a correct copy of a letter sent to the California Railroad Commission by the Southern Pacific Company through the witness' agency, transmitting the tariffs therein specified, and if these tariffs were filed with the Commission."

(9) The Court erred in sustaining plaintiff's objection to the letter offered by the defendant addressed to the Board of Railroad Commissioners at San Francisco, California, dated May 7, 1909, upon the ground that the same was irrelevant, incompetent, and immaterial, and the Court also erred in excluding said letter from evidence and in not admitting same in evidence and in ruling that the same was incompetent, irrelevant, and immaterial. Said letter so excluded from evidence was and is in words and figures following, to wit: [275—54]

(COPY)

ACT Z–11713

May 7th, 1909.

Board of Railroad Commissioners,
San Francisco, Cal.

Gentlemen:—We beg to acknowledge receipt of your favor of April 26th, in regard to filing Tariffs with your Board:

We have placed a C. C. No. on the upper margin of all Tariffs and Circulars which name rates or rules and regulations affecting rates on traffic having both origin and destination within the State of Cali-

fornia, and are handing you herewith all such issues published by the Southern Pacific Co. which are in effect on this date. The Tariffs are numbered consecutively with the lowest number on the bottom, and all supplements have been placed within each Tariff or attached to same in a secure manner which will enable you to readily place our entire issue in your files. It is understood that where other lines have issued Joint Tariffs in connection with the Southern Pacific Co. under proper concurrence, the issuing line only files such Tariffs with your Board, and that it is not necessary for other lines parties to such joint Tariffs to also file same under their individual C. C. No. which would only result in endless duplication of Tariffs in your files. Have asked the Chairman of the Western Classification Committee, and Mr. Mote of the Pacific Car Service Bureau, to file the Western Classification and the Car Demurrage Tariff with you direct for our account.

Following is a detailed statement of tariffs enclosed herewith, showing C. R. C. No., Tariff No., and Supplements by both C. R. C. No. and Tariff No.

Will you please favor us with a receipt for all of these issued. This communication is sent you in duplicate, so that it may be used to check our figures and serve to return one copy to us as a receipt for the publications. [276—55]

| C. R. C. No. | | Tariff No. | C. R. C. No. | Tariff No. |
|---|---|---|---|---|
| 1 | L. F. T. | 1 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37. | 67, 71, 74, 75, 76, 79, 80 83, 84, 87, 88, 89, 90 91, 93, 94, 95, 97, 99 100, 101, 102, 103, 104 105, 106, 107, 108, 109 110, 111, 112, 113, 114 115, 116, 117. |
| 2 | L. F. T. | 3 | 1, 2, 3. | 1, 2, 3, |
| 3 | L. F. T. | 4–A | | |
| 4 | L. F. T. | 5 | 1, | 2 |
| 5 | L. F. T. | 9–A | 1, 2, | 3, 4 |
| 6 | L. F. T. | 10–A | 1, 2, 3. | 4, 5, 6, |
| 7 | L. F. T. | 14–A | 1, 2, | 3, 4 |
| 8 | L. F. T. | 28–B | | |
| 9 | L. F. T. | 34–C | | |
| 10 | L. F. T. | 35 | | |
| 11 | L. F. T. | 36 | | |
| 12 | L. F. T. | 37 | 1, 2, | 3, 7, |
| 13 | L. F. T. | 39 | 1, | 1, |
| 14 | L. F. T. | 61–C | | |
| 15 | L. F. T. | 63–A | 1, | 1, |
| 16 | J. F. T. | 75 | 1, 2, | 2, 3, |
| 17 | L. F. T. | 79–B | | |
| 18 | J. F. T. | 83–A | | |
| 19 | J. F. T. | 84 | 1, 2, | 3, 4, |
| 20 | J. F. T. | 92 | 1, 2, | 4, 5 |
| 21 | L. F. T. | 102 | 1, 2, | 1, 3 |
| 22 | L. F. T. | 121–A | 1, 2, | 4, 5 |
| 23 | J. F. T. | 134–B | | |
| 24 | J. F. T. | 153–B | 1, | 1, |
| 25 | L. F. T. | 181–A | | |
| 26 | J. F. T. | 183–A | | |
| 27 | L. F. T. | 193 | 1, 2, | 2, 3 |
| 28 | L. F. T. | 195 | | |
| 29 | L. F. T. | 201–A | | |
| 30 | T. T. | 230–D | 1, | 1, |
| 31 | L. F. T. | 251–A | 1, | 3, |
| 32 | J. F. T. | 276–B | 1, 2, 3. | 1, 2, 3, |
| 33 | C. T. | 291–C | | |
| 34 | L. F. T. | 298 | | |
| 35 | L. F. T. | 301 | | |
| 36 | J. F. T. | 305 | 1, | 3, |
| 37 | L. F. T. | 316–B | | |
| 38 | J. F. T. | 320–A | | |
| 39 | J. F. T. | 322–A | | |
| 40 | J. F. T. | 327–A | | |
| 41 | L. F. T. | 330–B | 1, 2, 3. | 1, 2, 3, |
| 42 | L. F. T. | 332 | 1, 2, | 1, 2 |
| 43 | L. F. T. | 335–B | 1, 2, 3. | 1, 2, 3, |
| 44 | J. F. T. | 336 | | |
| 45 | L. F. T. | 339–B | | |
| 46 | J. F. T. | 340–A | | |

| C. R. C. No. | | Tariff No. | Supplements. C. R. C. No. | Tariff No. |
|---|---|---|---|---|
| 47 | L. F. T. | 348–B | | |
| 48 | J. F. T. | 349–B | | |
| 49 | L. F. T. | 350–C | | |
| 50 | L. F. T. | 353–A | | |
| 51 | J. F. T. | 358 | | |
| 52 | L. F. T. | 360–D | | |
| 53 | L. F. T. | 362 | | |
| 54 | J. F. T. | 374 | 1, | 2 |
| 55 | L. F. T. | 380–A | 1, | 1, |
| 56 | L. F. T. | 381 | | |
| 57 | L. F. T. | 382–A | | |
| 58 | L. F. T. | 383–B | | |
| 59 | J. F. T. | 384 | | |
| 60 | J. F. T. | 404–A | 1, 2, 3. | 1, 2, 3, |
| 61 | L. F. T. | 421 | 1, 2, | 1, 2 |
| 62 | L. F. T. | 440 | 1, | 1, |
| 63 | L. F. T. | 441 | 1, | 1, |
| 64 | L. F. T. | 442 | 1, | 4 |
| 65 | J. F. T. | 446–A | 1, | 2 |
| 66 | J. F. T. | 469 | 1, | 1, |
| 67 | J. F. T. | 473 | | |
| 68 | J. F. T. | 474 | 1, | 1, |
| 69 | J. F. T. | 475 | | |
| 70 | L. F. T. | 476 | | |
| 71 | L. F. T. | 477 | | |
| 72 | J. F. T. | 478 | | |
| 73 | J. F. T. | 490 | | |
| 74 | J. F. T. | 491–A | | |
| 75 | J. F. T. | 505 | | |
| 76 | J. F. T. | 511 | | |
| 77 | L. F. T. | 523 | 1, | 1, |
| 78 | Com. Trf. | 6 | 1, | 3, |
| 79 | " " | 7 | 1, | 10 |
| 80 | " " | 9 | 1, 2, 3. | 3, 9, 12 |
| 81 | " " | 73–G | 1, 2, 3. | 6, 7, 8 |
| 82 | " " | 78–G | 1, 2, 3. | 7, 10, 12 |
| 83 | " " | 82–G | 1, 2, 3. | 1, 8, 10 |
| 84 | Com. Specls. | 16–Y | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, | 1, 3, 11, 19, 24, 26, 29, 31, 33, 35, 36, 37, 38, 42, 43, 44, 45 |
| 85 | Jt. Com. Trf. | 4–NCNG | 1, 2, 3, 4, 5, 6, 7, | 1, 2, 3, 4, 5, 6, 7, |
| 86 | " Mdse. " | 5–NCNG | 1, 2, 3. | 1, 3, 4 |
| 87 | " " " | 11–S. Ry. | 1, 2, 3, 4, | 2, 3, 4, 5 |
| 88 | " Com. " | 13–S. Ry. | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, | 1, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17 |
| 89 | Mdse. Trf. | 74–G | 1, 2, | 4, 6 |
| 90 | Merchandise Tariff | 75–G | 1, 2, | 2, 4 |
| 91 | Merchandise Tariff | 76–G | 1, 2, 3. | 5, 9, 10 |
| 92 | Merchandise Tariff | 85–G | 1, 2, 3, 4, | 1, 4, 6, 7 |
| 93 | Merchandise Tariff | 86–G | | |
| 94 | Merchandise Tariff | 87–G | | |
| 95 | Merchandise Tariff | 9–VI | | 6 |
| 96 | Special Com. Tariff | 19–Y | 1, 2, 3, 4, | 12, 14, 15, 16 |
| 97 | Flour Specials | 3 | 1, 2, 3, 4, 5, | 1, 4, 14, 15, 16 |
| 98 | Flour Tariff | 3 | 1, 2, 3, 4, 5, 6, 7, 8, | 15, 16, 17, 21, 24, 25, 26, 27 |
| 99 | Fruit Specials | 4 | 1, 2, 3, 4, 5, 6, 7, | 1, 9, 10, 11, 15, 16, 17 |

| C. R. Co. No. | | Tariff No. | Supplements. C. R. C. No. | Tariff No. |
|---|---|---|---|---|
| 100 | Fruit Tariff | 4 | 1, 2, 3. | 4, 5, 6, |
| 101 | Grain Specials | 4 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, | 1, 5, 10, 11, 12, 14, 15, 17, 18, 19 |
| 102 | Grain Tariff | 4 | 1, 2, 3, 4, 5, 6, 7, | 16, 25, 28, 29, 30, 32, 33 |
| 103 | Hay & Straw Spl. | 3 | 1, 2, 3, 4, 5, 6, 7, 8, 9, | 1, 6, 12, 14, 15, 16, 18, 19, 20 |
| 104 | Hay & Straw Tariff | 6 | 1, 2, 3, 4, | 3, 8, 10, 11 |
| 105 | Ice Specials | 3 | 1, 2, 3, 4, | 1, 10, 12, 14 |
| 106 | Ice Tariff | 8 | 1, 2, | 1, 2 |
| 107 | Live Stock Specials | 3 | 1, 2, 3, 4, 5, 6, 7, | 4, 9, 11, 12, 14, 16, 17 |
| 108 | Live Stock Tariff | 6 | 1, 2, 3, 4, 5, 6, 7, | 1, 3, 7, 9, 11, 12, 13 |
| 109 | Lumber Specials | 3 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, | 1, 7, 14, 17, 18, 19, 21, 22, 23 |
| 110 | Lumber Tariff | 3 | 1, 2, 3, 4, 5, 6, | 1, 8, 9, 10, 13, 14 |
| 111 | Ore Specials | 3 | 1, 2, 3, 4, 5, 6, 7, | 6, 7, 15, 16, 20, 21, 22 |
| 112 | Ore Tariff | 3 | 1, 2, 3, 4, | 16, 17, 18, 19 |
| 113 | Placerville Com. Trf. | 1 | 1, 2, 3, 4, 5, 6, | 1, 2, 3, 4, 5, 6 |
| 114 | Switching Tariff | 1 | | |
| 115 | Switching Tariff | 2 | | |
| 116 | Vegetable Specials | 3 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, | 8, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23 |
| 117 | Vegetable Tariff | 4 | 1, | 5 |
| 118 | Spl. Wine Tariff | 1 | 1, 2, 3. | 1, 2, 3, |
| 119 | Spl. Wine Tariff | 2 | 1, 2, 3, 4, 5, 6, 7, | 1, 2, 3, 4, 5, 6, 7 |
| 120 | Spl. Wine Tariff | 3 | 1, 2, 3. | 1, 2, 3, |
| 121 | Spl. Wine Tariff | 4 | 1, 2, 3, 4, | 1, 2, 3, 4 |
| 122 | Spl. Wine Tariff | 5 | 1, 2, | 1, 2 |
| 123 | Spl. Wine Tariff | 6 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 |
| 124 | Spl. Wine Tariff | 8 | 1, | 1, |
| 125 | Spl. Wine Tariff | 9–A | | |
| 126 | Spl. Wine Tariff | 10 | 1 | 1 |
| 127 | Wood Specials | 3 | 1, 2, 3, 4, 5, 6, 7, | 6, 12, 14, 15, 16, 18, 19 |
| 128 | Wood Tariff | 2 | 1, 2, 3, 4, | 3, 6, 10, 11 |
| 129 | Exception Sheet | 2 | 1, | 2 |
| 130 | Jt. Special Rate | 153 | 1, 2, | 1, 2 |
| 131 | Jt. Special Rate | 157 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, | 2, 8, 10, 13, 15, 20, 25, 26, 27, 28 |
| 132 | Jt. Special Rate | 162 | 1, 2, | 1, 2 |
| 133 | Jt. Special Rate | 189 | 1, | 14 |
| 134 | Local Rates of 1894 | | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15; | H, I, J, K, M, N, O, P, Q, R, S, T, V, W |
| 135 | Local Rates | 135 | 1, 2, 3, 4, 5, 6, 7, 8, | 6, 14, 16, 21, 23, 24, 25, 26 |
| 136 | Local | 138 | | |
| 137 | Spcl. Frt. Tariff | 24 | | |
| 138 | Spcl. Frt. Tariff | 214–A | | |
| 139 | Special Freight Tariff | 219 | | |
| 140 | Special Freight Tariff | 236 | | |
| 141 | Special Freight Tariff | 286 | | |
| 142 | Special Freight Tariff | 296 | | |
| 143 | Special Freight Tariff | 301 | | |
| 144 | Special Freight Tariff | 310 | | |
| 145 | Special Freight Tariff | 311 | | |

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| 146 | Special Freight Tariff | 312 |
| 147 | Special Freight Tariff | 314 |
| 148 | Special Freight Tariff | 315 |
| 149 | Special Freight Tariff | 338 |
| 150 | Special Freight Tariff | 341 |
| 151 | Special Freight Tariff | 342 |
| 152 | Special Freight Tariff | 343–A |
| 153 | Special Freight Tariff | 348 |
| 154 | Special Freight Tariff | 349 |
| 155 | Special Freight Tariff | 356 |
| 156 | Special Freight Tariff | 367 |
| 157 | Special Freight Tariff | 371 |
| 158 | Special Freight Tariff | 386–A |
| 159 | Special Freight Tariff | 387–A |
| 160 | Special Freight Tariff | 388–A |
| 161 | Special Freight Tariff | 400 |
| 162 | Special Freight Tariff | 405 |
| 163 | Special Freight Tariff | 413 |
| 164 | Special Freight Tariff | 421 |
| 165 | Special Freight Tariff | 423 |
| 166 | Special Freight Tariff | 424 |
| 167 | Special Freight Tariff | 436 |
| 168 | Special Freight Tariff | 438–A |
| 169 | Special Freight Tariff | 444 |
| 170 | Special Freight Tariff | 451 |
| 171 | Special Freight Tariff | 454–A |
| 172 | Special Freight Tariff | 457 |
| 173 | Special Freight Tariff | 528 |
| 174 | Special Freight Tariff | 541 |
| 175 | Special Freight Tariff | 542 |
| 176 | Special Freight Tariff | 543 |
| 177 | Special Freight Tariff | 544 |
| 178 | Special Freight Tariff | 545 |
| 179 | Special Freight Tariff | 546 |
| 180 | Special Freight Tariff | 547 |
| 181 | Special Freight Tariff | 549–A |
| 182 | Special Freight Tariff | 550 |
| 183 | Special Freight Tariff | 551 |
| 184 | Special Freight Tariff | 552 |
| 185 | Special Freight Tariff | 553 |
| 186 | Special Freight Tariff | 554 |
| 187 | Special Freight Tariff | 555 |
| 188 | Special Freight Tariff | 559 |
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| 191 | Special Freight Tariff | 594 |
| 192 | Special Freight Tariff | 597 |
| 193 | Special Freight Tariff | 598 |
| 194 | Special Freight Tariff | 599 |
| 195 | Special Freight Tariff | 600 |
| 196 | Special Freight Tariff | 602 |
| 197 | Special Freight Tariff | 622 |
| 198 | Special Freight Tariff | 626 |
| 199 | Special Freight Tariff | 627 |
| 200 | Special Freight Tariff | 630 |
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| 202 | Special Freight Tariff | 635 |
| 203 | Special Freight Tariff | 644 |
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Supplements.

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| C. R. C. No. | | Tariff No. | C. R. C. No. | Tariff No. |
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| 205 | Special Freight Tariff | 670 | | |
| 206 | Special Freight Tariff | 672 | | |
| 207 | Special Freight Tariff | 674 | | |
| 208 | Special Freight Tariff | 675 | | |
| 209 | Special Freight Tariff | 687 | | |
| 210 | Special Freight Tariff | 688 | | |
| 211 | Special Freight Tariff | 689 | | |
| 212 | Special Freight Tariff | 697 | | |
| 213 | Special Freight Tariff | 703 | | |
| 214 | Special Freight Tariff | 704 | | |
| 215 | Special Freight Tariff | 705 | | |
| 216 | Special Freight Tariff | 706 | | |
| 217 | Special Freight Tariff | 712 | | |
| 218 | Special Freight Tariff | 716 | | |
| 219 | Special Freight Tariff | 718 | | |
| 220 | Special Freight Tariff | 720 | | |
| 221 | Special Freight Tariff | 721 | | |
| 222 | Special Freight Tariff | 722 | | |
| 223 | Special Freight Tariff | 723 | | |
| 224 | Special Freight Tariff | 724 | | |
| 225 | Special Freight Tariff | 725 | | |
| 226 | Special Freight Tariff | 726 | | |
| 227 | Special Freight Tariff | 727–B | | |
| 228 | Special Freight Tariff | 731 | | |
| 229 | Special Freight Tariff | 733 | | |
| 230 | Special Freight Tariff | 734 | | |
| 231 | Special Freight Tariff | 736 | | |
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| 232 | Special Freight Tariff | 737 | | |
| 233 | Special Freight Tariff | 739 | | |
| 234 | Special Freight Tariff | 740 | | |
| 235 | Special Freight Tariff | 741 | | |
| 236 | Special Freight Tariff | 742 | | |
| 237 | Special Freight Tariff | 744 | | |
| 238 | Special Freight Tariff | 748 | | |
| 239 | Spl. Joint Frt. Tariff | 749 | | |
| 240 | Special Freight Tariff | 750 | | |
| 241 | Special Freight Tariff | 751 | | |
| 242 | Special Freight Tariff | 752 | | |
| 243 | Special Freight Tariff | 753–A | | |
| 244 | Special Freight Tariff | 755 | | |
| 245 | Special Freight Tariff | 756 | | |
| 246 | Special Freight Tariff | 757 | | |
| 247 | Special Freight Tariff | 758 | | |
| 248 | Special Freight Tariff | 760 | | |
| 249 | Special Freight Tariff | 761 | | |
| 250 | Special Freight Tariff | 762 | | |
| 251 | Special Freight Tariff | 763 | | |
| 252 | Special Freight Tariff | 765–A | | |
| 253 | Special Freight Tariff | 767 | | |
| 254 | Special Freight Tariff | 768 | | |
| 255 | Special Freight Tariff | 770–A | | |
| 256 | Special Freight Tariff | 772 | | |
| 257 | Special Freight Tariff | 773 | | |
| 258 | Special Freight Tariff | 774 | | |
| 259 | Special Freight Tariff | 776 | | |
| 260 | Special Freight Tariff | 777 | | |
| 261 | Special Freight Tariff | 779 | | |
| 262 | Special Freight Tariff | 781 | | |
| 263 | Special Freight Tariff | 782 | | |

| C. R. C. No. | | Tariff No. |
|---|---|---|
| 264 | Special Freight Tariff | 783 |
| 265 | Special Freight Tariff | 785 |
| 266 | Spl. Jt. Frt. Tariff | 786 |
| 267 | Special Freight Tariff | 788 |
| 268 | Special Freight Tariff | 789 |
| 269 | Special Freight Tariff | 793 |
| 270 | Special Freight Tariff | 794 |
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| 274 | Special Jt. Frt. Tariff | 801 |
| 275 | Special Freight Tariff | 803 |
| 276 | Special Freight Tariff | 804 |
| 277 | Special Freight Tariff | 805 |
| 278 | Special Freight Tariff | 806 |
| 279 | Special Freight Tariff | 809 |
| 280 | Special Freight Tariff | 810 |
| 281 | Special FreightTariff | 812 |
| 282 | Special Freight Tariff | 813 |
| 283 | Special Freight Tariff | 814–A |
| 284 | Special Freight Tariff | 816 |
| 285 | Special Freight Tariff | 817 |
| 286 | Special Freight Tariff | 818 |
| 287 | Special Freight Tariff | 819–A |
| 288 | Special Freight Tariff | 820 |
| 289 | Special Freight Tariff | 822 |
| 290 | Special Freight Tariff | 823 |
| 291 | Special Freight Tariff | 824 |
| 292 | Special Freight Tariff | 825–A |
| 293 | Special Freight Tariff | 826 |
| 294 | Special Freight Tariff | 827 |
| 295 | Special Freight Tariff | 828 |
| 296 | Special Freight Tariff | 829 |
| 297 | Special Freight Tariff | 830 |
| 298 | Special Freight Tariff | 831 |
| 299 | Special Freight Tariff | 832 |
| 300 | Special Freight Tariff | 833 |
| 301 | Special Joint Freight Tariff | 834–A |
| 302 | Special Freight Tariff | 835 |
| 303 | Special Freight Tariff | 837 |
| 304 | Special Freight Tariff | 840 |
| 305 | Special Freight Tariff | 841 |
| 306 | Special Freight Tariff | 842 |
| 307 | Special Freight Tariff | 843 |
| 308 | Special Freight Tariff | 844 |
| 309 | Special Freight Tariff | 845 |
| 310 | Special Freight Tariff | 846 |
| 311 | Special Freight Tariff | 847 |
| 312 | Special Freight Tariff | 848 |
| 313 | Special Freight Tariff | 849 |
| 314 | Special Freight Tariff | 850 |
| 315 | Special Freight Tariff | 851 |
| 316 | Special Freight Tariff | 852 |
| 317 | Special Freight Tariff | 853 |
| 318 | Special Freight Tariff | 854 |
| 319 | Special Freight Tariff | 858 |
| 320 | Special Freight Tariff | 859 |
| 321 | Special Freight Tariff | 860 |
| 322 | Special Freight Tariff | 862 |
| 323 | Special Freight Tariff | 863 |
| 324 | Special Freight Tariff | 864 |

Supplements.

| C. R. C. No. | Tariff No. |
|---|---|

| C. R. C. No. | | Tariff No. | Supplements. C. R. C. No. | | Tariff No. |
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| 325 | Special Freight Tariff | 865–A | | | |
| 326 | Special Freight Tariff | 866 | | | |
| 327 | Special Freigh tTariff | 867 | | | |
| 328 | Special Freight Tariff | 868 | | | |
| 329 | Special Freight Tariff | 869 | | | |
| 330 | Special Freight Tariff | 870 | | | |
| 331 | Special Freight Tariff | 871 | | | |
| 332 | Special Freight Tariff | 872 | | | |
| 333 | Special Freight Tariff | 873 | | | |
| 334 | Special Freight Tariff | 876 | | | |
| 335 | Special Freight Tariff | 878 | | | |
| 336 | Special Freight Tariff | 879 | | | |
| 337 | Special Freight Tariff | 880 | | | |
| 338 | Special Freight Tariff | 881 | | | |
| 339 | Special Freight Tariff | 883 | | | |
| 340 | Special Freight Tariff | 884 | | | |
| 341 | SpecialFreight Tariff | 885 | | | |
| 342 | Special Freight Tariff | 886 | | | |
| 343 | Special Freight Tariff | 887 | | | |
| 344 | Special Freight Tariff | 888 | | | |
| 345 | Special Freight Tariff | 889 | | | |
| 346 | Special Freight Tariff | 890 | | | |
| 347 | Special Jt. Frt. Tariff | 892 | | | |
| 348 | Special Freight Tariff | 895 | | | |
| 349 | Special Freight Tariff | 898 | | | |
| 350 | Special Freight Tariff | 899 | | | |
| 351 | Special Freight Tariff | 900 | | | |
| 352 | Special Freight Tariff | 3–TAG | | | |
| 353 | Special Freight Tariff | 15–TAG | 1, | 1 | |
| 354 | Special Freight Tariff | 20–TAG | | | |
| 355 | Special Freight Tariff | 22–TAG | | | |
| 356 | Special Freight Tariff | 23–TAG | | | |
| 357 | Special Freight Tariff | 27–TAG | | | |
| 358 | Special Freight Tariff | 29–TAG | | | |
| 359 | Special Freight Tariff | 31–TAG | | | |
| 360 | Special Freight Tariff | 33–TAG | | | |
| 361 | Special Freight Tariff | 36–TAG | | | |
| 362 | Special Freight Tariff | 39–TAG | | | |
| 363 | Special Freight Tariff | 42–TAG | | | |
| 364 | Special Freight Tariff | 44–TAG | | | |
| 365 | Special Freight Tariff | 45–TAG | | | |
| 366 | Special Freight Tariff | 47–TAG | | | |
| 367 | Special Freight Tariff | 49–TAG | | | |
| 368 | Special Freight Tariff | 50–TAG | | | |
| 369 | Special Freight Tariff | 51–TAG | | | |
| 370 | Special Freight Tariff | 52–TAG | | | |
| 371 | Special Freight Tariff | 53–TAG | | | |
| 372 | Special Freight Tariff | 54–TAG | | | |
| 373 | Special Freight Tariff | 57–TAG | | | |
| 374 | Special Freight Tariff | 58–TAG | | | |
| 375 | Special Freight Tariff | 59–TAG | | | |
| 376 | SpecialFreight Tariff | 59½–TAG | | | |
| 377 | Special Freight Tariff | 60–TAG | | | |
| 378 | Special Freight Tariff | 61–TAG | | | |
| 379 | Special Freight Tariff | 62–TAG | | | |
| 380 | Special Freight Tariff | 63–TAG | | | |
| 381 | Special Freight Tariff | 64–TAG | | | |
| 382 | Special Freight Tariff | 65–TAG | | | |
| 383 | Local Rate | 116 | | | |
| 384 | Circular GFD | 98 | 1 | 1 | |
| 385 | " " | 120–J | | | |

| C. R. C. No. | | Tariff No. | Supplements. C. R. C. No. | Tariff No. |
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| 386 | Circular GFD | 121–B | 1, 2, 3. | 2, 3, 4, |
| 387 | " " to 184 inclusive | 124 | 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, | 1–129, 1–132, 1–135, 1–139 1–141, 1–147, 1–148, 1–152, 1–153, 1–158, 1–170, 1–173 |
| 388 | Circular GFD | 186–K | | |
| 389 | " " | 188–A | 1, 2, | 3, 5 |
| 390 | " " | 195 | 1, 2, 3, 4, 5, | 76, 80, 89, 104, 105 |
| 391 | " " | 197–B | 1, | 1, |
| 392 | " " | 204–B | 1, | |
| 393 | " " | 207–B | | |
| 394 | " " | 210 | 1, | 1, |
| 395 | " " | 212–B | | |
| 396 | " " | 216 | | |
| 397 | Circular Letter | 319 | | |
| 398 | " " | 335 | | |

Yours truly,
H. A. JONES. (Signed.)
F. W. G.

GHR.

RECEIVED
May 8, 1909,
BOARD OF RAILROAD COMMISSIONERS.
W. D. WAGNER. (Signed.)
**[284—63]**

(10) The Court erred in sustaining and in not overruling the plaintiff's objection to the offer made by the defendant to show by the witness Gomph that all the tariffs of Southern Pacific Company relative to the movement of freight in California, were actually filed with and remained on file with the Railroad Commission of the State of California until the Commission entered an order on June 11, 1909, approving the tariffs on file, said objection being made upon the ground that said offer was immaterial, irrelevant, and incompetent. The Court also erred in ruling and holding that said offer was immaterial, irrelevant and incompetent, and in refusing to permit defendant to make said showing.

(11) The Court erred in sustaining plaintiff's objection to the certified copy of the order made and entered by the Railroad Commission of the State of California dated June 11, 1909, approving the rates, fares and charges of carriers named in said order, said objection being made upon the ground that said order was immaterial, irrelevant and incompetent. The Court also erred in excluding said order from evidence and in not admitting the same in evidence and in ruling that the same was incompetent, irrelevant, and immaterial. The order so excluded from evidence was and is in words and figures following, to wit: [285—64]

SPECIAL MEETING

Friday, June 11th, 1909.

OFFICE OF THE BOARD OF RAILROAD COMMISSIONERS.

Room 10—Ferry Building San Francisco, Cal.

June 11th, 1909.

Pursuant to a resolution adopted by this Commission, June 1st, 1909, the Board met in special session at 10 o'clock A. M. on the above.

PRESENT:

COMMISSIONERS—Irwin, Loveland and Summerland and Secretary Wagner.

On motion of Commissioner Loveland, duly seconded by Commissioner Summerland, the following resolution was unanimously adopted:

WHEREAS, pursuant to and in conformity with a resolution of this Board adopted at the meeting of March 30, 1909, certain carriers to wit:

Northern Electric Railway Company
Ocean Shore Railway Company
Los Angeles & Redondo Railway Company
Nevada & California Railway Company
Sunset Western Railway Company
Sunset Railroad Company
Bay Point & Clayton Railroad Company
Tonopah & Tidewater Railroad Company
California Transportation Company
The Pullman Company
California Railway
Los Angeles Pacific Company
Nevada-California-Oregon & Sierra Valleys Railway Co.

Pacific Car Service Bureau
Sierra Railway of California
South San Francisco Belt Railway Company
Colusa & Lake Railroad Company
Arcata & Mad River Railroad Company
Richmond Belt Railway Company
Sugar Pine Railway Company
Los Angeles & San Diego Beach Railway Company
Nevada County Narrow Gauge Railroad Company
Lake Tahoe Railway & Transportation Company
San Diego Southern Railway Company
Stone Canon Pacific Railroad Company
Butte County Railroad Company
San Diego, Cuyama ca & Eastern Railway Company
Oregon & Eureka Railroad Company
Amador Central Railroad Company
San Francisco, Oakland & San Jose Consolidated Railroad Company [286—65]
Iron Mountain Railway Company
McCloud River Railroad Company
Petaluma & Santa Rosa Transportation Company
San Pedro, Los Angeles & Salt Lake Railroad Company
Atchison, Topeka & Santa Fe Railway Company
Diamond & Caldor Railway Company
Southern Pacific Company
Western Pacific Railway Company

Wells Fargo & Company Express
Trans-Continental Scrip Bureau

have each filed with this Commission a printed copy open to public inspection, of schedules, showing the rates, fares and charges of said carriers respectively for transportation of freight and passengers within this State, between different points on their own routes and between points on their own routes and the routes of any other transportation company, when a through or joint rate is in force, and also a like printed copy of schedules for charges for services in connection with the receipt, delivery, transfer in transit, ventilation, refrigeration, icing, storing and handling of property by said carriers respectively.

IT IS THEREFORE RESOLVED, that the aforesaid schedules be and they are hereby received and filed by this Commission as the rates, fares and charges, and joint rates, fares and charges, to the extent that any thereof are joint, which have been made and filed by said carriers respectively, pursuant to the provisions of Section 18 of the Act of the Legislature of this State approved March 20, 1909; and that the said rates, fares and charges shall be published by said carriers respectively as required by the said act, and shall be the lawful rates, fares and charges of said carriers respectively, subject to be changed as in said section provided, or by this

Commission pursuant to the provisions of Section 19 of the aforesaid act.

A true copy.

[Seal] H. G. MATHEWSON (Signed.)

Assistant Secretary Railroad Commission State of California. **[287—66]**

(12) The Court erred in sustaining and in not overruling plaintiff's objection to the offer made by the defendant to show by the witness J. K. Butler, Assistant General Freight Agent of defendant, Southern Pacific Company, that in his opinion as a freight traffic man the rates charged to plaintiff's assignors in this case were reasonable in and of themselves for the service performed, and that the through rate contended for in this action was a rate less than a reasonable rate in and of itself, for the service to be performed under the through rate and was compelled by actual water competition between the port of San Francisco and the ports tributary to Los Angeles. The Court also erred in refusing to permit said witness to testify to said facts and in ruling that the same were incompetent, irrelevant and immaterial.

XVI.

The Court erred in holding and deciding that:

"It is not true as alleged in Paragraph IV of defendant's answer that in each or any instance stated in the complaint where for the transportation of property defendant charged more for the shorter distance than for the longer distance, in the same direction, of the same amount and class of property,

defendant had been so authorized to do by said Railroad Commission."

XVII.

The Court erred in holding and deciding that:

"It is not true, as alleged in Paragraph V of defendant's answer, that in the case of all or any of the shipments described in the complaint as having moved or having been delivered after October 10, 1911, the Railroad Commission of the State of California had prescribed, by order or otherwise, that the defendant might be relieved from the prohibition of the Constitution of the State [288—67] of California against charging less for the longer than for the shorter haul. Nor is it true, that, as alleged in defendant's seventh further and separate defense contained in its answer, that as to each and all or any of the shipments referred to in plaintiff's separately stated causes of action, which moved or were delivered after October 10, 1911, the Railroad Commission of the State of California, pursuant to Section 21, Article XII, of the Constitution of the State of California, as amended October 10, 1911, or otherwise, authorized defendant, after investigation, or at all, to charge more for the shorter distance to the point between San Francisco and Los Angeles to which such shipment was transported, than for the longer distance in the same direction."

XVIII.

The Court erred in holding and deciding that:

"It is not true, as alleged in paragraph III of defendant's answer, that the property transported by defendant, as alleged in the several separately

stated causes of action, was not property of the same class as the property on which lower through rates from Los Angeles to San Francisco were then being charged by defendant, but to the contrary the Court finds that such property was, in each instance, property of the same class as the property on which lower through rates were so charged."

XIX.

The Court rendered judgment against the defendant whereas judgment should have been rendered in favor of defendant and against plaintiff.

Wherefore said defendant, Southern Pacific, Company, plaintiff [289—68] in error, prays that the judgment of said District Court may be reversed and that said defendant may have judgment against plaintiff for its costs and disbursements here expended.

HENLEY C. BOOTH,
GEO. D. SQUIRES,
FRANK B. AUSTIN,
Attorneys for Defendant, Southern Pacific Company and Plaintiff in Error.

[Endorsed]: Filed Jul. 29, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk, [290—69]

*In the District Court of the United States in and for the Northern District of California, Second Division.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing Amount of Bond.**

In this 29th day of July, 1915, came the above-named Southern Pacific Company, a corporation, defendant herein, by Henley C. Booth, George D. Squires and Frank B. Austin, its attorneys, and filed herein and presented to this Court, its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises:

ON CONSIDERATION WHEREOF, this Court does allow the writ of error, upon the said defendant giving a bond, according to [291] law, in the sum of five thousand dollars, lawful money of the

United States, which said bond shall operate as a supersedeas bond.

Dated at San Francisco, this 29th day of July, 1915.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: Filed Jul. 29, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [292]

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY (a Corporation),

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation),

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that whereas, lately in a District Court of the United States, in and for the Northern District of California, Second Division, in a suit depending in said court between the California Adjustment Company, a corporation, as plaintiff, and Southern Pacific Company, a corporation, as defendant, a judgment was rendered against the said Southern Pacific Company, a corporation, for the sum of Three thousand nine hundred twenty-eight and 1/100 Dollars

($3928.01), together with costs and disbursements in the additional sum of $38.70, and the said Southern Pacific Company, a corporation, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit and a citation having issued directed to said California Adjustment Company, a corporation, citing and admonishing it to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, in said court, on the 25th day of August, 1915. [293]

NOW, THEREFORE, in consideration of the premises and of such writ of error the United States Fidelity & Guaranty Company, a corporation, organized and existing under the laws of the State of Maryland and having its principal place of business in the City of Baltimore, in said State, and having a paid-up capital and surplus of Two Million Dollars ($2,000,000), duly incorporated under the laws of said State of Maryland for the purpose of making and guaranteeing and becoming surety upon bonds or undertakings required or authorized by law, and which said corporation has complied with all the requirements of the laws of the State of California regulating the admission and right of said corporation to transact such business in said State, is held and firmly bound unto the above-named plaintiff, California Adjustment Company, a corporation, in the full and just sum of Five Thousand Dollars ($5000), lawful money of the United States, to be paid to said plaintiff, California Adjustment Com-

pany, its successors or assigns, for which payment well and truly to be made, the said United States Fidelity & Guaranty Company, a corporation, binds itself by these presents.

The condition of the above obligation is such that if the said Southern Pacific Company, a corporation, the defendant in said action, and plaintiff in error aforesaid, shall prosecute said writ of error to effect and answer all damages and costs that may be awarded against it if it fails to make its said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the said United States Fidelity & Guaranty Company, a corporation, has caused this obligation to be signed by its duly authorized attorney in fact and its corporate **[294]** seal to be hereunto affixed at San Francisco, California, this 30th day of July, 1915.

UNITED STATES FIDELITY & GUARANTY COMPANY,

[Seal] By H. V. D. JOHNS,
Attorney in Fact.
By BRADLEY CARR,
Attorney in Fact.

State of California,
City and County of San Francisco,—ss.

On this 30th day of July, in the year one thousand nine hundred and 15, before me, M. J. Cleveland, a Notary Public in and for the City and County of San Francisco, personally appeared H. V. D. Johns and Bradley Carr, known to me to be the persons whose names are subscribed to the

within instrument as the attorneys in fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys in fact.

[Seal] M. J. CLEVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

The above and foregoing bond upon writ of error is hereby approved, and execution stayed pending the determination of said writ.

Dated July 30th, 1915.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Jul. 30, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[295]**

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**[Certificate of Clerk of U. S. District Court to Transcript of Record.]**

*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,638.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing two hundred ninety-five (295) pages, numbered from 1 to 295, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $281.30; that said amount was paid by the Southern Pacific Company, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of August, A. D. 1915.

[Seal] WALTER B. MALING.

Clerk U. S. District Court, Northern District of California.

[Ten Cent Internal Revenue Stamp. Canceled Aug. 30, 1915. W. B. M.] **[296]**

*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

United States of America,
Ninth Judicial Circuit,—ss.

**Writ of Error.**

The President of the United States of America:

To the Honorable the Judge of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court, before you, at the March, 1915, term thereof, wherein Southern Pacific Company, a corporation, is plaintiff in error, and California Adjustment Company, a corporation, is defendant in error, and wherein said California Adjustment Company, a corporation, was plaintiff and said Southern Pacific Company, a corporation, was defendant, a manifest error has happened, to the great damage of the said Southern Pacific Company, a corporation, the plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning **[297]** the same, to the United

States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, where said court is sitting, on the 25th day of August, 1915, and within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States ~~Circuit Judge, Ninth Circuit, Northern District of California,~~ the 30th day of July, A. D. 1915.

J. A. S. Dep. Clk.

[Seal] WALTER B. MALING,

Clerk of the District Court of the United States for the Northern District of California, Second Division.

By J. A. SCHAERTZER,
Deputy Clerk.

Allowed by

WM. W. MORROW,
United States Circuit Judge. **[298]**

Due service and receipt of a copy of the within Writ of Error is hereby admitted this 30th day of July, 1915.

HOEFLER, COOK, HARWOOD & MORRIS, and
ALFRED J. HARWOOD,
Attorneys for Plaintiff and Defendant in Error.

[Endorsed]: No. 15,638. United States Circuit Court of Appeals, Ninth Judicial Circuit. Southern Pacific Company, Plaintiff in Error, vs. California Adjustment Co., Defendant in Error. Writ of Error. Filed Jul. 30, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded. By the Court.

[Seal] WALTER B. MALING,
Clerk. [299]

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**Citation on Writ of Error.**

United States of America,
Northern District of California,—ss.

The President of the United States, to California Adjustment Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 25th day of August, 1915, being within thirty (30) days from the date hereof, pursuant to

a Writ of Error filed in the clerk's office of the District Court of the United States for the Northern District of California, Second Division, wherein Southern Pacific Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Southern Pacific Company, a corporation, plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM W. MORROW, United States Circuit Judge for the Ninth Circuit, Northern District of California, this 30th day of July, A. D. 1915.

WM. W. MORROW,
United States Circuit Judge. [300]

Due service and excerpt of a copy of the within Citation on Writ of Error is hereby admitted this 30th day of July, 1915

HOEFLER, COOK, HARWOOD & MORRIS, and
ALFRED J. HARWOOD,
Attorneys for Plaintiff and Defendant in Error.

[Endorsed]: No. 15,638. United States Circuit Court of Appeals, Ninth Judicial Circuit. Southern Pacific Company, Plaintiff in Error, vs. California Adjustment Co., Defendant in Error. Citation on Writ of Error. Filed Jul. 30, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2643. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. California Adjustment Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed August 30, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a Corporation,

Defendant in Error.

**Order Extending Time to [September 2, 1915] to File Record on Writ of Error and to Docket the Cause.**

Good cause appearing therefor, it is hereby ordered that the plaintiff in error may have to and including September 2, 1915, in which to file its record on writ of error and to docket the cause in the

United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 24, 1915.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. 2643. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to —— to File Record Thereof and to Docket Case. Filed Aug. 25, 1915.. F. D. Monckton, Clerk. Refiled Aug. 30, 1915. F. D. Monckton, Clerk.